No. 78-156

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA

v.

HUGH J. ADDONIZIO

UNITED STATES OF AMERICA

v.

THOMAS J. WHELAN and THOMAS M. FLAHERTY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX

CITATIONS

Cases

Cases—Continued Page

Cases—Continued Page

Statutes, regulations and rules:

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Third Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-21a) is reported at 573 F.2d 147. The opinion of the district court in *Addonizio* (App. E, *infra*, pp. 27a-32a) is not reported. The opinion of the United States District Court for the District of New Jersey in *Whelan* (App. F, *infra*, pp. 33a-42a) is reported at 427 F. Supp. 379. The opinion of the United States District Court for the Middle District of Pennsylvania in a related proceeding involving respondents Whelan and Flaherty (App. G, *infra*, pp. 43a-50a), in which no review is being sought in this Court, is not reported.

JURISDICTION

The judgments of the court of appeals (Apps. B, C and D, *infra*, pp. 22a-26a) were entered on February 27, 1978. On May 19, 1978, Mr. Justice Brennan extended the time within which to file a petition for writ of certiorari to and including July 27, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a district court may revise a lawful sentence on collateral attack when decisions of the Parole Commission "frustrated the sentencing intent" of the court.

STATUTES AND RULE INVOLVED

1. 18 U.S.C. 4205(a) provides:

> Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one third of such term or terms or after serving ten years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law.

2. 28 U.S.C. 2255 provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
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> * * * * *
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> If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

3. Fed. R. Crim. P. 35 provides:

> The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law.

STATEMENT

A. The Parole Release System

A district judge has numerous options when sentencing a defendant who has been convicted of a crime. A number of these options depend on the age or drug addiction of the defendant,[1] but the three options most commonly used are specified by 18 U.S.C. 4205.[2] A sentence under Section 4205(a) requires the

[1] See, for example, 18 U.S.C. 4251-4255 (narcotic addicts), 5005-5026 (offenders less than 22 years old at the time of conviction), 5031-5042 (juvenile delinquents), 4216 (offenders 22 to 25 years old at the time of conviction), 4205(c) (commitment for psychological study).

[2] The provisions of Section 4205 are a recodification of 18 U.S.C. (1970 ed.) 4202 and 4208 accomplished by the Parole Commission and Reorganization Act, Pub. L. 94-233, 90 Stat. 219-231. The Act also renamed the Board of Parole as the Parole Commission. For purposes of clarity, this petition uses both the numbering system and the terminology of the present statute, regardless of the numbering system and terminology in effect at the time particular events took place.

prisoner to serve one-third of the maximum sentence before becoming eligible for parole.[3] A court may elect to impose sentence under Section 4205(b)(2), in which event the prisoner "may be released on parole at such time as the [Parole] Commission may determine." Or a court may designate, under Section 4205(b)(1), a minimum term of imprisonment that will establish parole eligibility somewhere between the beginning of the sentence and one-third of the maximum.

Courts may suspend any sentence they impose and place the defendant on probation for a period that does not exceed five years. 18 U.S.C. 3651. A court may not, however, split a lengthy sentence between imprisonment and probation in a way that dictates the amount of time the prisoner spends in jail. Probation may not be combined with a sentence entailing incarceration in excess of six months (Section 3651, ¶ 2).

A prisoner is entitled to be released at the expiration of his maximum sentence, less "good time" computed according to 18 U.S.C. 4161. Good time can be as much as one-third of the sentence, but more commonly it amounts to approximately one-quarter of the sentence. A prisoner also acquires an expectation of release slightly before the point established by ac-

[3] If the sentence is more than 30 years, the prisoner is eligible for parole after serving ten years.

cumulated good time. Under 18 U.S.C. 4206(d) any prisoner sentenced to more than five years' imprisonment "shall be released on parole after having served two-thirds of each consecutive term" or 30 years, whichever is first, unless the Commision determines that the prisoner "has seriously or frequently violated institution rules" or that there is a "reasonable probability" that the prisoner would commit further crimes.

During the period between the prisoner's first eligibility for parole and the two-thirds point, the Commission has substantial discretion to decide whether to grant release on parole. 18 U.S.C. 4206(a). Under 18 U.S.C. (1970 ed.) 4203, which was in effect when respondents were sentenced, the Commission was entitled to consider any aspect of the public welfare in making its decision. Under the present statute the Commission must consider "the public welfare" and whether "release would * * * depreciate the seriousness of [the] offense or promote disrespect for the law," standards that give the Commission ample if not unlimited discretion. The Commission now must exercise its discretion pursuant to published guidelines that establish approximate ranges of time that most offenders can expect to serve. See 18 U.S.C. 4203 (a)(1) and 4206(a).

Until 1970 the Commission exercised its discretion case by case, using no published criteria or guidelines. In response to widespread criticism that this led to arbitrary and erratic decisions, with similarly situated persons receiving materially different treatment, the Commission began to experiment with structured

release criteria that took into account the nature of the offense and the offender's personal characteristics. These offense and offender characteristics were assigned weights and converted into numerical values; after computing the numerical values, the prisoner and the Parole Commission could turn to a table to find a range (*e.g.*, 36 to 45 months) that most (but not all) of the persons with similar characteristics could expect to serve, with good institutional behavior, before release.[4] The program was commenced in 1970, before respondents were sentenced,[5] and it was revised in November 1973 (38 Fed. Reg. 31942). The present guidelines are codified at 28 C.F.R. 2.20.[6]

The guidelines are "the result of an effort to introduce more consistency in parole decision-making" (*United States* v. *DiRusso*, 535 F.2d 673, 674 (C.A. 1)), and they serve this function principally by enabling the Commissioners to announce—to the Commission's hearing examiners especially—how the Com-

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[4] For a history of this development and a description of the system, see Stanley, *Prisoners Among Us: The Problem of Parole* (1976); Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 Yale L.J. 810 (1975).

[5] See United States Board of Parole, *Biennial Report* 20-21 (1970). The program commenced in 1970 was a precursor to a more elaborate experiment begun in 1972. The 1972 experiment in the Commission's northeast region (which includes New Jersey) involved a table of factors and the computation of guideline release ranges similar to those in use today.

[6] The guidelines are subject to periodic study and revision. See 42 Fed. Reg. 39808. See also S. Conf. Rep. No. 94-648, 94th Cong., 2d Sess. 27 (1976).

mission exercises the discretion given it by statute. As the Conference Committee put it in recommending enactment of the current statute, "the parole authority must have in mind some notion of the appropriate range of time for an offense", and the "use of guidelines * * * will sharpen this process and improve the likelihood of good decisions." S. Conf. Rep. No. 94-648, 94th Cong., 2d Sess. 19 (1976). But the guidelines are not inflexible. They establish broad ranges rather than fixed periods of confinement; they assume good institutional behavior, so that extraordinary behavior (good or bad) will cause a departure from the guidelines; and the Commission has generally reserved the privilege to depart from the guidelines whenever it concludes that circumstances warrant. 28 C.F.R. 2.18, 2.20(c).

B. Addonizio

Following a jury trial in the United States District Court for the District of New Jersey, respondent Addonizio was convicted of conspiring to interfere with interstate commerce by extortion, and of 63 counts of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951. The evidence demonstrated that Addonizio, while Mayor of Newark, New Jersey, had engaged in an extensive conspiracy to extort money from persons doing business with the City. District Judge Barlow sentenced him on September 22, 1970, to 10 years' imprisonment with a fine of $25,000. The court of appeals affirmed. *United States* v. *Addonizio*, 451 F.2d 49 (C.A. 3), certiorari denied, 405 U.S. 936.

Respondent's sentence was imposed under what is now 18 U.S.C. 4205(a), and he became eligible for parole on July 3, 1975, after serving one-third of his sentence. On July 8, 1975, the Commission, after a hearing, decided not to release respondent. It fixed January 1977 as the earliest date for release. The Commission held another hearing on December 8, 1976; it announced on January 13, 1977, that it would not release Addonizio before the expiration of his sentence (less good time credits). The Commission explained that Addonizio's crimes were so extensive and demonstrated such a breach of public trust that a decision to release him would depreciate the seriousness of his offenses and promote disrepect for the law (App. A, *infra*, pp. 12a-13a).

Addonizio filed a motion, invoking the district court's jurisdiction under 28 U.S.C. 2255, asking the court to resentence him to time served. Judge Barlow stated that in sentencing Addonizio he had expected him to be confined "for a period of approximately three and one-half to four years" (App. E, *infra*, p. 28a) and to be held longer only if he had a poor institutional record. Judge Barlow explained that he had not anticipated that the Commission would give significant emphasis to the gravity of Addonizio's offense, and he concluded that because of this emphasis Addonizio "has not received the type of meaningful parole hearing contemplated by the Court" (*id.* at 30a). After determining that he had jurisdiction under Section 2255 to reduce any sentence concerning which his expectations had been frustrated (*id.* at

31a-32a), Judge Barlow reduced Addonizio's sentence to time served as of April 27, 1977.[7]

C. Whelan and Flaherty

Following a jury trial in the United States District Court for the District of New Jersey, respondents Whelan and Flaherty were convicted of two counts of conspiracy to commit extortion, and of 27 counts of extortion, in violation of 18 U.S.C. 1951 and 1952. Whelan was the Mayor, and Flaherty a city councilman, of Jersey City, New Jersey (App. G, *infra*, p. 50a). The evidence showed that they and others extorted at least $1.2 million from persons doing business with the City and deposited those sums in numbered accounts in Florida. The money has never been recovered. See Apps. F and G, *infra*, pp. 34a-36a, 49a-50a.

District Judge Shaw sentenced respondents to 15 years' imprisonment on August 10, 1971. In light of a plea agreement on tax evasion charges, Whelan and Flaherty did not appeal their convictions.[8] They did, however, file motions for reduction of sentence pursuant to Fed. R. Crim. P. 35, and Judge Shaw denied those motions on May 16, 1972 (App. F, *infra*,

[7] The court of appeals stayed the order reducing Addonizio's sentence. This Court then vacated the order of the court of appeals. *Addonizio* v. *United States*, 431 U.S. 909.

[8] The tax evasion sentences, which were affirmed by the court of appeals, run concurrently with the extortion sentences. See *United States* v. *Kenny*, 462 F.2d 1205 (C.A. 3), certiorari denied *sub nom. Sternkopf* v. *United States*, 409 U.S. 914.

pp. 40a-41a). The court of appeals affirmed on December 8, 1972 (*id.* at 41a). Respondents then filed an action under 28 U.S.C. 2255 contending that their sentences were arbitrary and excessive, but Judge Shaw denied relief on December 12, 1973, and the court of appeals again affirmed. See App. F, *infra*, p. 41a.

Whelan and Flaherty, like Addonizio, were sentenced under 18 U.S.C. 4205(a). They became eligible for parole in 1976 after serving one-third of their sentences. The Parole Commission held a hearing in June 1976; on July 12, 1976, it denied their applications for parole and set June 1978 as the date for the next hearing (App. F, *infra*, p. 41a). The Commission explained that the guideline ranges for respondents indicated that they should serve a total of 26 to 36 months' imprisonment, but that respondents would not be released because their offenses were part of large-scale organized criminal activity and involved a breach of the public trust (App. G, *infra*, p. 48a).

Whelan and Flaherty then filed two suits challenging their confinement. One, invoking jurisdiction under 28 U.S.C. 2255, was filed in the sentencing court. It was assigned to Judge Biunno, because Judge Shaw had died. The other, invoking jurisdiction under 28 U.S.C. 2241, was filed in the district of confinement and assigned to Judge Muir.

Judge Biunno decided the Section 2255 case in March 1977 (App. F, *infra*, pp. 33a-42a). He concluded that most of respondents' arguments were "a rehash of what was argued before Judge Shaw" (*id.* at 35a), and that the only new point was a contention

that decisions of the Parole Commission had frustrated Judge Shaw's sentencing intent. Judge Biunno stated (*ibid.*): "the real issue is whether the Parole Commission's denial of parole was arbitrary and capricious." After examining the nature of respondents' crimes, Judge Biunno concluded that the Commission properly denied parole because "[t]he spectacle of Whelan and Flaherty being paroled and free to escape with their ill-gotten gains" would be "revolting" (*id.* at 36a). Judge Biunno also examined the statements Judge Shaw had made during earlier proceedings and determined that "a resentencing now would inevitably frustrate Judge Shaw's intent on sentencing" (*id.* at 37a n. 2). Judge Biunno therefore denied respondents' motions to reduce sentence.

Judge Muir decided the Section 2241 case in September 1977 (App. G, *infra*, pp. 43a-50a). He concluded that a court sitting in *habeas corpus* may correct arbitrary and capricious decisions by the Commission (*id.* at 47a-48a). He held, however, that it was appropriate for the Commission to deny parole to Whelan and Flaherty in light of the nature of their crimes (*id.* at 49a-50a). He therefore denied the petitions for *habeas corpus*.

D. The Decision Of The Court Of Appeals

The United States appealed from the reduction of Addonizio's sentence, and Whelan and Flaherty appealed from the denials of relief in both of their cases. The court of appeals affirmed Judge Muir's decision, holding that Judge Muir had stated the proper standard and applied it correctly (App. A, *infra*, p. 20a).[9] The court reversed Judge Biunno's decision and affirmed in Addonizio's case.

The court first held that the district courts have jurisdiction to revise sentences under 28 U.S.C. 2255. It characterized Section 2255 and Fed. R. Crim. P. 35 —which allows reduction of sentence within 120 days after the sentence becomes final—as simply alternate methods of sentence review (App. A, *infra*, pp. 4a-6a). Then, building on three earlier cases,[10] it held that a district court may revise a sentence, lawful when imposed, in response to parole decisions that frustrate its sentencing intent. The governing principle, the court stated, is that because judges have "near absolute control over maximum punishment, it would necessarily follow that the sentencing judge's intentions and expectations as to actual time of incarceration should be vindicated to the maximum extent possible" (*id.* at 9a). The court continued: "regard for the integrity of the sentencing court, as well as concepts of decency and fair play, dictate that the court should be in a position to vindicate [its] original intentions and expectations" (*ibid.*).

These "moral considerations" (App. A, *infra*, p. 9a), the court explained, are especially applicable

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[9] Whelan and Flaherty have not sought review of this judgment—nor, of course, do we—and it therefore has become final.

[10] *United States* v. *Salerno*, 538 F.2d 1005 (C.A. 3), rehearing denied, 542 F.2d 628; *United States* v. *Somers*, 552 F.2d 108 (C.A. 3); *United States* v. *Solly*, 559 F.2d 230 (C.A. 3).

when there has been a "post-sentencing change in criteria governing parole determinations" (*ibid.*). The court thought that there had been such a change here, not so much because of the introduction of the guidelines (after all, respondents have been held in prison beyond the periods projected by the guidelines for ordinary cases) but because the Commission now considers the seriousness of the offense in deciding whether to grant parole. At the time respondents were sentenced, the court stated, sentencing courts "operated under the assumption that, given a good institutional record, and aside from a finding of probable recidivism, the [Commission] would generally grant parole upon the completion of one-third of the sentence" (*id.* at 11a). That no longer holds true, the court stated, and it found that this change in the Commission's release policy frustrated the expectation of judges who had imposed sentences before the change.

The court of appeals found this enough to require affirmance of the decision in Addonizio's case, because the sentencing judge explicitly stated that his intent had been frustrated (App. A, *infra*, pp. 12a-18a). Moreover, the court concluded, the Commission was not entitled to deny parole for the same reason that the sentencing judge had given in imposing sentence—here the seriousness of the offense. It stated (*id.* at 16a): "Traditional standards of criminal justice reject this apparent double punishment for the same factor—one punishment imposed by the sentencing court, the other by the Parole Commission." As to Whelan and Flaherty, the court ruled that they

"should have the benefit of the rule this court announces today" (*id.* at 19a), and that Judge Biunno must reconsider the case to determine whether Judge Shaw's intent had been frustrated.[10a]

REASONS FOR GRANTING THE PETITION

1. The power to determine how long a felon spends in prison is widely shared (see pages 4-8, *supra*). The Legislative Branch fixes the ranges within which sentence may be imposed. The Judicial Branch imposes sentence in each case, selecting a maximum and minimum punishment from among those authorized by Congress.[11] The Executive Branch determines the exact date of release, either through the Parole Commission or through the President's power of pardon. This case involves the allocation of release authority between the sentencing court and the Parole Commission.

The question of authority arises, at least potentially, in every criminal case. The court of appeals' statement that "a sentencing judge's intent and probable expectations should be vindicated to the fullest extent possible" (App. A, *infra*, p. 8a), and its hold-

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[10a] On July 21, 1978, the National Appeals Board of the Commission decided to release Whelan and Flaherty on parole on August 10, 1978. This does not make their case moot, however, because Whelan and Flaherty have requested a resentencing that would terminate the Commission's supervision over them. If they should be resentenced, supervision could cease immediately; without resentencing, supervision would continue until 1986. See 18 U.S.C. 4209, 4210 and 4214; App. F, *infra*, p. 37a n.2.

[11] See, *e.g.*, *Ex parte United States*, 242 U.S. 27 (courts must follow sentencing rules established by Congress).

ing that the sentencing court possesses authority under 28 U.S.C. 2255 to vindicate that sentencing intent whenever the Parole Commission uses its broad discretion in a way that the court did not anticipate, raise fundamental questions concerning the appropriate allocation of responsibility.

The courts of appeals are deeply divided concerning the extent to which sentencing courts may revise sentences in response to parole decisions. The court of appeals in the present case has adopted the view that a sentencing court can "vindicate" its "intent" whenever the Commission alters the standards under which it exercises discretion, and perhaps even when the Commission exercises its discretion in a way that the district court disapproves.[12] The Eighth Circuit has adopted a different rule, under which courts may revise some sentences, but only those imposed before November 1973 under 18 U.S.C. 4205(b)(2), which

[12] The court of appeals' decision involves sentences imposed before November 1973, when the Parole Commission adopted its guideline system (see page 7, *supra*). But because the court's rationale focuses on the frustration of the sentencing judge's subjective intent, it has much wider implications. Subjective intent can be thwarted by a revision of existing guidelines or by any decision to deny release. As the First Circuit concluded in *United States* v. *McBride*, 560 F.2d 7, 11, "The reason for the court's not anticipating the impact of [parole policy] is unimportant. The basic question is whether, when shaping its sentence, the sentencing court's failure to predict what the parole authorities would do provides any ground" to change the sentence on collateral attack. So long as the parole and sentencing decisions are made by separate bodies, it is inevitable that judges will continue to be "frustrated" by parole decisions with which they disagree. The court of appeals' decision is therefore not limited in importance to cases involving persons sentenced before November 1973.

allows immediate parole eligibility. See *Edwards* v. *United States*, 574 F.2d 937 (C.A. 8), petition for a writ of certiorari pending.[13]

The First, Second, Sixth, Seventh and Ninth Circuits, however, have held that sentencing courts have no authority to revise lawful sentences in response to parole decisions. These courts hold that it makes no difference when the sentences were imposed, and whether a change in the Commission's policies, or a decision in a particular case, frustrated the sentencing judge's expectations. See *United States* v. *McBride*, 560 F.2d 7 (C.A. 1);[14] *Persico* v. *United States*, 538 F.2d 316 (C.A. 2) (table), certiorari denied, 429 U.S. 1091;[15] *Wright* v. *United States*, 557 F.2d 74 (C.A. 6);[16] *Coil* v. *United States*, C.A. 7, Misc. No. 76-8086, decided September 17, 1976, certiorari denied, 429 U.S. 1050; *Andrino* v.

[13] We have filed a petition in *Edwards* simultaneously with this petition, and we have furnished a copy of the *Edwards* petition to counsel for respondents. See also *Kortness* v. *United States*, 514 F.2d 167 (C.A. 8); *Kills Crow* v. *United States*, 555 F.2d 183 (C.A. 8) (discussing more than five other Eighth Circuit cases that dealt with the same question).

[14] See also *United States* v. *DiRusso*, 535 F.2d 673 (C.A. 1); *Thompson* v. *United States*, 536 F.2d 459, 460 n. 1 (C.A. 1); *United States* v. *DiRusso*, 548 F.2d 372 (C.A. 1).

[15] Cf. *Billiteri* v. *United States Board of Parole*, 541 F.2d 938, 944 (C.A. 2) (habeas corpus is the exclusive jurisdictional base for review of parole decisions, and the "only remedy * * * is to order the [Commission] to correct the abuses or wrongful conduct within a fixed period of time * * *").

[16] See also *Jenks* v. *United States*, C.A. 6, No. 76-2699, decided June 17, 1977, certiorari denied, January 9, 1978 (No. 77-572).

United States Board of Parole, 550 F.2d 519 (C.A. 9).[17] The Fifth Circuit has indicated that it is inclined to follow these five courts if it should be squarely presented with the problem. *United States* v. *Kent*, 563 F.2d 239 (C.A. 5).[18] The conflict is well established, and it should be resolved by this Court.

2. Three assumptions of fact or conclusions of law undergird the court of appeals' decision. They are: first, that until 1973 the Commission paid scant attention to the gravity of the offense but has changed its practice to respondents' detriment; second, that it is properly within the province of district courts to have "expectations" about how the Commission would exercise its discretion within the limits established by the sentence; and third, that these expectations may be "vindicated" on collateral attack. If the court of appeals is wrong on any one of these points, its judgment cannot be sustained. We discuss the second and third points first, because they are of the greatest general importance.

a. The court of appeals reasoned that, because

[17] See also *Tedder* v. *United States Board of Parole*, 527 F.2d 593, 594 n. 1 (C.A. 9); *Elliott* v. *United States*, 572 F.2d 238 (C.A. 9); *Bonanno* v. *United States*, C.A. 9, No. 76-1122, decided March 3, 1978, petition for a writ of certiorari pending, No. 77-1665.

[18] *Kent* held that a sentence imposed after November 1973 may not be reduced despite any frustration of the sentencing judge's subjective expectations. See also *Blau* v. *United States*, 566 F.2d 526 (C.A. 5). A panel of the Fifth Circuit asserted (in *dicta*) in *United States* v. *McIntosh*, 566 F.2d 949, that sentences imposed before November 1973 could be reduced under Section 2255, but it later withdrew the opinion (566 F.2d at 952).

judges have almost unlimited control of the maximum sentence, they must also have control of the actual amount of time to be served (App. A, *infra*, pp. 8a-9a). That conclusion is a *non sequitur*. Congress gave to judges the power to fix maximum and minimum terms, and to the Commission the power to determine the release date within those limits (see pages 4-8, *supra*). Congress has provided that the judicially-fixed minimum term cannot exceed one-third of the maximum sentence set by the court. The denial of judicial power to fix a precise release date, coupled with the grant of releasing power to the Commission, establishes an allocation of functions that courts may not disregard.

The Court recognized this allocation of functions in *United States* v. *Grayson*, No. 76-1572, decided June 26, 1978, slip op. 6. So long as Congress adheres to its decision to commit release decisions to an administrative panel, courts may not insist that the administrative body exercise its discretion in any particular way, and any attempt to "vindicate" the personal expectations of the sentencing judges would nullify the legislative plan. As the First Circuit explained in *United States* v. *DiRusso*, 548 F.2d 372, 374-375: "the division of responsibility between the sentencing court and the Parole Commission would be seriously skewed if a sentence could be vacated whenever the Parole Commission exercised its discretion so that a particular prisoner was to be confined for a substantially longer period than the sentencing judge had contemplated. * * * To permit the district court to revise a sentence whenever the Parole Commission's de-

cision was inconsistent with his intent would divest the Commission of its discretionary power under the law, and defeat the objectives of placing the parole decision in a separate body." The same court also concluded that the Commission is entitled to exercise its discretion in any reasonable way, and "[w]e do not see how the [Commission's] proper exercise of [its] own authority can be said to revest the court with sentence review powers" (*United States* v. *McBride, supra*, 560 F.2d at 11).

b. Congress deprived judges of the power to fix precise release dates because they are not well situated to follow a case long after the trial and because they cannot adjust release dates to "balanc[e] differences in sentencing policies and practices between judges and courts." [19] After fixing sentence, "the judge becomes progressively less familiar with the considerations material to the adjustment of punishment to fit the criminal. At the same time, the officials of the Executive Branch responsible for these matters become progressively better qualified to make the proper adjustments." *Affronti* v. *United States*, 350 U.S. 79, 84 n. 13. This Court therefore has held that judges do not have any general power to revise sentences after their imposition, even though new information has come to a court's attention. See *Affronti* v. *United States, supra*; *United States* v. *Murray*, 275 U.S. 347. The Court stated in *Murray* that the Executive Branch possesses the sole power to release

[19] S. Conf. Rep. No. 94-648, 94th Cong., 2d Sess. 19 (1976).

a defendant before his maximum term, unless Congress clearly intended to allow courts to exercise a coordinate sentence reduction power in particular cases (275 U.S. at 356-357). Moreover, "it is unlikely that Congress would have found it wise to make [judicial control over the sentence] apply in such a way as to unnecessarily overlap the parole and executive-clemency provisions of the law." *Affronti, supra*, 350 U.S. at 83.

Fed. R. Crim. P. 35 modifies the result of *Affronti* and *Murray* by giving courts authority to reduce sentences during the first 120 days after the sentence has become final. This time cannot be extended. See Fed. R. Crim. P. 45. The time limit of Rule 35 presumes that only the Executive Branch may reduce a lawful sentence thereafter. Given that presumption, and the rule of *Affronti* and *Murray*, the court of appeals was wrong in concluding that 28 U.S.C. 2255, which allows courts to set aside sentences that are "subject to collateral attack," supplies a residual source of judicial authority to revise sentences in response to parole decisions. The "subject of collateral attack" provision of Section 2255 is not a catch-all that authorizes courts to do whatever they believe is required in the interests of justice. "[T]he appropriate inquiry [is] whether the claimed error of law [is] 'a fundamental defect which inherently results in a complete miscarriage of justice'" (*Davis* v. *United States*, 417 U.S. 333, 346, quoting from *Hill* v. *United States*, 368 U.S. 424, 428).

Respondents' sentences were lawful when imposed; respondents do not here contest the findings of guilt, and their sentences were well within the statutory maxima. Those sentences authorized confinement until their expiration, and the decision of the Commission not to release respondents does not violate the Constitution or laws of the United States. It is therefore difficult to understand how a decision by the Parole Commission that respondents must continue to serve those lawful sentences makes the sentences "subject to collateral attack" within the meaning of Section 2255. Service of a lawful sentence imposed after a fair trial is not a "complete miscarriage of justice" that authorizes modification of a sentence on collateral review.

The sentencing process described by this Court in *Grayson* is replete with possibilities of misunderstanding. A court does not possess perfect information at the time of sentencing. But just as a judge could not reduce a sentence five years after its imposition because he has been persuaded that the defendant is not the malefactor the judge once thought him to be, so the judge cannot reduce a lawful sentence because he is surprised to learn that the parole authorities do not yet find the defendant suitable for release on parole.

c. At all events, the court of appeals' assumption that the Parole Commission radically changed its approach to its task after respondents had been sentenced is wrong. The court thought that, until 1973, prisoners with good institutional adjustment could ex-

pect to be released after serving one-third of their sentences [20] and that the Commission disregarded offense severity in making parole decisions (App. A, *infra*, p. 11a). But the bench and bar were on notice at least as early as 1962 that the gravity of the offense, and the prisoner's part in it, played important roles in the decision to grant or deny parole.[21] No judge should have thought that the Commission would ignore the nature of the crime in making its decisions.

Moreover, a sample of the parole records of federal prisoners given hearings in 1970—the year Addonizio was sentenced—demonstrates that most prisoners were not released until well after one-third of the maximum sentence. Indeed, in 1970 only 42.2 percent of prisoners with good institutional records

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[20] But see *Ryan* v. *United States*, 547 F.2d 426, 427 (C.A. 8) ("When the district court sentenced Ryan (in 1971) it could not have reasonably expected that he would be paroled at any given time—only that he would be eligible for parole at the one-third point of his sentence").

[21] See, *e.g.*, Federal Judicial Center, *Deskbook for Sentencing* V6-7 (1962) ("There are various factors related to the prisoner which the Board of Parole may consider as they vote for or against parole. A partial list of these are the following: * * * (a) The offense * * *"); remarks of Richard A. Chappell, Chairman of the Board of Parole, at the November 1964 Institutes on Sentencing, *Federal Parole*, 37 F.R.D. 207, 210 ("I think I should report to you on the criteria for * * * granting parole. Time will permit only a brief categorizing of major considerations: 1. Gravity of the Offense * * *"); Board of Parole, *Biennial Report* 22 (1970) ("The factors which the Board uses to make decisions in accordance with the above [statutory] criteria are classified in the following general categories * * * (B) Facts and circumstances of the offense * * *").

and no prior convictions were released at the one-third point.[22]

By establishing guidelines, the Parole Commission has changed the way it exercises its discretion. The Commission continues to make adjustments, and an evolution of paroling practices is a natural concomitant of granting discretion to a special body with changing membership and with sensitivity to changing penological philosophy. A change in paroling practices is especially likely when the administrative agency engages—as the Commission has—in research and experimentation designed to improve its practices and to promote decisions that are fairer and more uniform. But this evolution simply shows that the

[22] Statistics derived by the Commission's staff from computer coded information that was prepared by the research staff of the National Commission on Crime and Delinquency during its study of federal parole decisionmaking between 1969 and 1972 reveal that during 1970, of persons who received sentences under 18 U.S.C. 4205(a) and who had no prison disciplinary infraction, 21.8 percent were released after one-third of their sentences, 16.7 percent were released sometime after the one-third point, and 61.5 percent were held until mandatory release. If the sample is confined to first offenders, the figures are 42.2 percent released at one-third, 27.9 percent released after one-third, and 29.9 percent held until mandatory release.

Persons sentenced under 18 U.S.C. 4205(b)(2) fared slightly better. Of persons with no disciplinary infraction, 31.0 percent were released at or before the one-third point, 25.6 percent were paroled after the one-third point, and 43.4 percent were held until mandatory release. Of those in this group who were first offenders, 58.5 percent were paroled at or before the one-third point, 26.2 percent were paroled later, and 15.4 percent were held until mandatory release.

Commission has used the discretion with which it was entrusted, and its use of discretion is not a reason for courts to claim a continuing authority to revise sentences.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1978.

APPENDIX A

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

Nos. 77-1542, 77-1621 and 77-2373

HUGH J. ADDONIZIO

v.

UNITED STATES OF AMERICA,
APPELLANT IN No. 77-1542

THOMAS J. WHELAN, and THOMAS M. FLAHERTY,
APPELLANTS IN No. 77-1621

v.

UNITED STATES OF AMERICA

THOMAS J. WHELAN, #73405-158,
THOMAS M. FLAHERTY, #73404-158,
APPELLANTS IN No. 77-2373

v.

FLOYD E. ARNOLD, WARDEN, U. S. PENITENTIARY,
LEWISBURG, PA., and MAURICE H. SIGLER, CHAIRMAN,
UNITED STATES BOARD OF PAROLE

Argued Jan. 12, 1978

Decided Feb. 27, 1978

As Amended April 3, 1978

Before ALDISERT and HUNTER, Circuit Judges, and CAHN, District Judge.*

OPINION OF THE COURT

ALDISERT, Circuit Judge.

These appeals require us to examine again the propriety of post-sentencing relief under 28 U.S.C. § 2255 [1] by a sentencing court upon a showing that the sentencing judge's expectations were frustrated by subsequent changes in criteria considered by the Parole Commission granting or denying release. *See* 39 Fed.Reg. 20028-39 (1974), now codified as amended in 28 C.F.R. § 2.20 (1976). In No. 77-1542, the government has appealed from relief granted to Hugh J. Addonizio by the sentencing judge. Appellants Thomas J. Whelan and Thomas M. Flaherty appeal at No. 77-1621 from the judgment of the district court refusing

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* Honorable Edward N. Cahn, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

[1] § 2255. *Federal custody; remedies on motion attacking sentence*

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

relief requested under § 2255, the decision having been made by a member of the court substituting for the now deceased sentencing judge. They also appeal at No. 77-2373 from a denial of relief in a separate action under 28 U.S.C. § 2241 for reasons that track those asserted in their § 2255 case.

I.

In the seminal case of *United States* v. *Salerno*, 538 F.2d 1005 (3d Cir. 1976), this court formulated a rule that resentencing is required in a § 2255 proceeding where implementation of the Parole Commission's guidelines frustrated the sentencing judge's probable expectations in the imposition of a sentence pursuant to 18 U.S.C. § 4208(a)(2).[2] In that case we found

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[2] § 4208. *Fixing eligibility for parole at time of sentencing*

(a) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interests of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than, but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may become eligible for parole at such time as the board of parole may determine.

* * * *

This provision has been recodified with minor alteration of language, at 18 U.S.C. § 4205(b). We will refer to it as § 4208(a), as it was codified at the time of imposition of sentence.

that the sentencing judge's intentions had been clearly stated at the time of sentencing. Subsequently, in *United States* v. *Somers*, 552 F.2d 108, 113 (3d Cir. 1977), we emphasized that "the intent and expectation of the district court judge who sentences under § 4208 (a) (2) . . . are controlling and . . . must be searched out to determine if relief may be ordered under 28 U.S.C. § 2255." Further, we said that "in our judgment, there can be no better evidence of a sentencing judge's expectations or intent than his own statement of those facts," *id.*, and determined that the intent or expectation could be derived from the sentencing judge's statement at the § 2255 hearing. In *United States* v. *Solly*, 559 F.2d 230 (3d Cir. 1977), we extended the rule of *Salerno* and *Somers* to a sentence imposed pursuant to 18 U.S.C. § 4208(a) (1).

II.

The threshold question of jurisdiction is critical to our analysis. The government argues here, as it did in previous cases before us, that a sentencing court has no jurisdiction to reduce a sentence after the period of 120 days after sentence or final unsuccessful appeal, as provided in Fed.R.Crim.P. 35,[3] *United*

[3] *Rule 35.*

CORRECTION OR REDUCTION OF SENTENCE

The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law.

As amended Feb. 28, 1966, eff. July 1, 1966.

States v. *Robinson*, 361 U.S. 220, 226, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960); *United States* v. *Robinson*, 457 F.2d 1319 (3d Cir. 1972); *see also United States* v. *Olds*, 426 F.2d 562, 565 (3d Cir. 1970). The applications for relief here were made beyond the 120 day period.

We have previously rejected the government's contention that Rule 35 was the exclusive jurisdictional avenue for sentence reduction. *United States* v. *Salerno*, *supra*, 538 F.2d at 1008 n.4. Because the government repeatedly presents the Rule 35 contention, notwithstanding that the *Salerno* rule is now settled case law for the district courts in this circuit, it may be useful to explain the distinct bases of a district judge's authority under Rule 35 and § 2255 respectively. Rule 35's provision that a court "may reduce a sentence within 120 days" vests virtually unlimited power in the court to reduce the sentence without the necessity of any finding that the original sentence is subject to collateral attack or is otherwise contrary to law. By contrast, § 2255 vests in the sentencing court discrete jurisdiction to entertain a motion "to vacate, set aside, or correct" a sentence "at any time",

and provides that where the court concludes it "was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack", the court has the power to "discharge the prisoner or resentence him . . . or correct the sentence as may appear appropriate".

It should be readily apparent that although the district court has broad discretion under Rule 35 to reduce an otherwise legal sentence within the appropriate 120 days, relief under § 2255 is independently available if any of the specified reasons exists. *See Kills Crow* v. *United States*, 555 F.2d 183, 188 (8th Cir. 1977). We reiterate the position of this circuit, originally expressed in *Salerno*, and repeated in *Somers*, that sentencing courts do have jurisdiction to entertain the § 2255 motions presented in these appeals.[4]

III.

Before analyzing the specific factual backgrounds of the several appeals presented here, it is necessary to address the government's second major contention common to all the appeals before us. It argues that because *Salerno* and *Solly* involved sentences imposed

[4] Faced with a claim for relief based upon frustration of a district court's sentencing expectations by the subsequent change in Parole Policy Guidelines, the Eighth Circuit determined that the case came within the collateral attack clause of § 2255. *Kortness* v. *United States*, 514 F.2d 167, 170 (8th Cir. 1975), cited with approval in *Salerno, supra*, 538 F.2d at 1008 n.4.

pursuant to 18 U.S.C. § 4208(a), these cases may not serve as precedent for attacks on the sentences involved in the present appeals, which were imposed pursuant to 18 U.S.C. § 4202.[5]

A.

Our beginning point is a recognition that the *Salerno* holding was a legal rule in the narrow sense, in the Pound formulation, a legal precept "attaching a definite detailed legal consequence to a definite, detailed state of facts."[6] Nevertheless we expanded its reach to a different set of facts in *Somers* (where the intention of the sentencing judge was expressed at the § 2255 hearing and not at the time of sentence) and extended it yet further in *Solly* (to a § 4208(a)(1) sentence). Thus, from an original holding we have seen, in Cardozo's words, "[t]he directive force of a principle . . . exerted along the line of logical pro-

[5] § 4202. *Prisoners eligible*

A Federal prisoner, other than a juvenile delinquent or a committed youth offender, wherever confined and serving a definite term or terms of over one hundred and eighty days, whose record shows that he has observed the rules of the institution in which he is confined, may be released on parole after serving one-third of such term or terms or after serving fifteen years of a life sentence or of a sentence of over forty-five years.

This provision was subsequently repealed, Pub. L. 94-233, 90 Stat. 219 (1976); a substitute provision enacted at that time is codified at 18 U.S.C. § 4205(a).

[6] R. Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 Tul.L.Rev. 475, 482 (1933). "Rules are

gression . . . ." [7] The answer to the government's contention, therefore, requires an inquiry into the instrumental principles that influenced the creation of the *Salerno* rule, and its subsequent extension to *Somers* and *Solly*. Only with these principles identified can we determine whether they can be applied to the cases before us.

Upon analysis we find that the major principle influencing these decisions was that a sentencing judge's intent and probable expectations should be vindicated to the fullest extent possible. The moral support [8] for this precept is self-evident. It is the sentencing judge —and no other judicial or administrative tribunal— who sets the maximum limits of any sentence. So long as the maximum comes within the statutory limits and the sentencing process follows appropriate procedures, there can be no judicial review of the sentence he pronounces. *Gov't. of the Virgin Islands* v. *Richardson*, 498 F.2d 892 (3d Cir. 1974). The rationale underlying this broad discretion afforded the sentencing judge is the same as that supporting the latitude given the trial judge in his other discretionary

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fairly concrete guides for decision geared to narrow categories of behavior and prescribing narrow patterns of conduct." G. Hughes, *Rules, Policy and Decisionmaking*, 77 Yale L.J. 411, 419 (1968).

[7] B. Cardozo, The Nature of the Judicial Process 30 (1921).

[8] We use the term "moral" in the sense of conventional morality. *See* H. L. A. Hart, The Concept of Law 165 (1961), for the thesis that legal principles derive from conventional morality, conceptualized as standards of conduct "which are widely shared in a particular society."

functions, namely, "the superiority of his nether position. It is not that he knows more than his loftier brothers; rather, he sees more and senses more." M. Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 Syracuse L.Rev. 635, 663 (1971). Given this near-absolute control over maximum punishment, it would necessarily follow that the sentencing judge's intentions and expectations as to actual time of incarceration should be vindicated to the greatest extent possible. The Parole Commission's decision was based on a set of guidelines which was not in effect at the time of sentencing. Under circumstances where the prisoner is required to serve an appreciably longer term of imprisonment because these subsequently adopted parole guidelines effect a provable frustration of those intentions and expectations, regard for the integrity of the sentencing court, as well as concepts of decency and fair play, dictate that that court should be in a position to vindicate those original intentions and expectations.

Woven in the texture of a legal principle, these moral considerations take the form of a right of a prisoner to relief upon proof that the sentencing judge's intentions and expectations regarding the prisoner's incarceration have been frustrated by a post-sentencing change in criteria governing parole determinations.

B.

So postulating the instrumental legal principle that led to the various results in *Salerno*, *Somers*, and

Solly, it should be readily discernible that the controlling determinant is not necessarily the specific statute pursuant to which the sentence was imposed, but rather, whether the facts disclose an expression of the sentencing judge's intentions and expectations and a subsequent frustration thereof by the change in guidelines. Thus, because the facts did so disclose in *Solly*, we had no difficulty in applying the principle that had previously commanded relief from a § 4208(a)(2) sentence in *Salerno* to a sentence imposed pursuant to § 4208(a)(1). We must now determine whether there exists a fundamental distinction between a § 4208 (a)(1) sentence and one imposed pursuant to § 4202 so as to command a different result here.

The starting point for this analysis is the relevant part of § 4202 which provides that a prisoner "whose record shows that he has observed the rules of the institution in which he is confined, may be released on parole after serving one-third of such term . . . ." Interpreting this statute in *Berry* v. *United States*, 412 F.2d 189, 192 (3d Cir. 1969), we said:

> In any normal sentencing procedure in the federal courts, a sentence prescribing a number of years of imprisonment generally means that the defendant may expect to serve approximately one-third of this term *with good conduct*. Probation and parole are concepts which our society have come to accept as natural incidents of rehabilitation during imprisonment.

(Emphasis supplied).

We could say this in 1969, because like the sentencing judges in the present appeals we knew that prior to 1970, the Parole Board relied on the criteria of former 18 U.S.C. §§ 4202 and 4203: (1) observation of the rules of the institution in which the prisoner is confined; (2) a reasonable probability that the prisoner will live and remain at liberty without violating the laws; and (3) release not incompatible with the welfare of society. *See* 28 C.F.R. § 2.2 (1971). We were also familiar with the views generally held by the sentencing judges in this circuit. Thus, the sentencing judge in *Somers* wrote: "Prior to the adoption of the new guidelines which are now in effect, and which became effective in late 1973, the Parole Board based its decision primarily upon institutional behavior and the probability of recidivism. See [28] C.F.R. § 2.4 (1973)." 552 F.2d at 112. And in *Salerno* we emphasized the importance of "district court sentencing practice." 538 F.2d at 1008. Thus, prior to the imposition of the new Parole Commission guidelines, both this court and the sentencing courts in this circuit operated under the assumption that, given a good institutional record, and aside from a finding of probable recidivism, the Parole Board would generally grant parole upon the completion of one-third of the sentence to any prisoner sentenced under § 4202.

This being so, there is no basic distinction between a sentencing judge's expectation of service of one-third of the sentence under § 4202, as generally per-

ceived by our trial and appellate judges, and service of a specific minimum period of incarceration imposed under § 4208(a)(1). If the *Salerno* rule were supported by sufficient and perceptible reason so as to apply it to *Solly's* § 4208(a)(1) sentence, no meaningful reason can be advanced for not applying the same rule for the same reason to a sentence imposed pursuant to § 4202. Thus, in Karl Llewellyn's words, "the rule follows where its reason leads; where the reason stops, there stops the rule." [9]

IV.

We turn now to the Addonizio case. Originally sentenced to ten years incarceration by Judge Barlow, he began serving his sentence on March 6, 1972. At the time Judge Barlow granted him release on April 28, 1977, he had served five years and two months of his ten-year sentence, considerably more than the 3⅓ years constituting the one-third usually associated with a § 4202 sentence.

On December 22, 1976 the Parole Commission had denied parole, stating this reason: "Pursuant to CFR 2.17 your offense behavior was part of a large scale criminal conspiracy or a continuing criminal enterprise." App. at 39. On January 13, 1977 the Commission again denied parole, stating:

> Your offense behavior has been rated as very high severity. Your salient factor score is 11. You have been in custody a total of 57 months at

[9] K. Llewellyn, The Bramble Bush 157-58 (1960).

> time of hearing. Guidelines established by the Commission for adult cases which consider the above factors suggest a range of 26-36 months to be served before release for cases with good institutional adjustment. After careful consideration of all relevant factors and information presented, a decision above the guidelines appears warranted because your offense was part of an ongoing criminal conspiracy lasting from 1965 to 1968, which consisted of many separate offenses committed by you and approximately 14 other co-conspirators. As the highest elected official in the City of Newark, you were convicted of an extortion conspiracy in which, under color of your official authority, you and your co-conspirators conspired to delay, impede, obstruct, and otherwise thwart construction in the City of Newark in order to obtain a percentage of contracts for the privilege of working on city construction projects.
>
> Because of the magnitude of this crime (money extorted totalling approximately $241,000) its economic effect on innocent citizens of Newark, and because the offense involved a serious breach of public trust over a substantial period of time, a decision above the guidelines is warranted. Parole at this time would depreciate the seriousness of the offense and promote disrespect for the law.

App. at 27-28.

An earlier July 8, 1975 application had been rejected by the United States Board of Parole for the same reasons.

The Parole Commission's ostensible rationale in denying parole must now be placed in juxtaposition with the reasons stated by the sentencing court in originally imposing the ten-year sentence:

> THE COURT:
>
> * * * *
>
> Weighed against these virtues, [Mr. Addonizio's record of public service] . . . is his conviction by a jury in this court of crimes of monumental proportion, the enormity of which can scarcely be exaggerated and the commission of which create the gravest implications for our form of government.
>
> Mr. Addonizio, and the other defendants here, have been convicted of one count of conspiring to extort and 63 substantive counts of extorting hundreds of thousands of dollars from persons doing business with the City of Newark. An intricate conspiracy of this magnitude, I suggest to you, Mr. Hellring [defense counsel], could have never succeeded without the then-Mayor Addonizio's approval and participation.
>
> These were no ordinary criminal acts. . . . These crimes for which Mr. Addonizio and the other defendants have been convicted represent a pattern of continuous, highly-organized, systematic criminal extortion over a period of many years, claiming many victims and touching many more lives.
>
> Instances of corruption on the part of elected and appointed governmental officials are certainty not novel to the law, but the corruption disclosed here, it seems to the Court, is com-

> pounded by the frightening alliance of criminal elements and public officials, and it is this very kind of totally destructive conspiracy that was conceived, organized and executed by these defendants.
>
> . . . It is impossible to estimate the impact upon—and the cost of—these criminal acts to the decent citizens of Newark, and, indeed, to the citizens of the State of New Jersey, in terms of their frustration, despair and disillusionment.
>
> . . .
>
> Their crimes, in the judgment of this Court, tear at the very heart of our civilized form of government and of our society. The people will not tolerate such conduct at any level of government, and those who use their public office to betray the public trust in this manner can expect from the courts only the gravest consequences.
>
> * * * *
>
> It is, accordingly, the sentence of this Court that the defendant Hugh J. Addonizio shall be committed to the custody of the Attorney General of the United States for a term of ten years, and that, additionally, the defendant Hugh J. Addonizio shall pay a fine of $25,000. That is all.

App. 23-26.

A fair reading of the reasons given by the Parole Commission for denying parole clearly shows that they are identical with those stated by the court in justification of the hefty ten-year sentence—because Addonizio participated in an intricate conspiracy of

great magnitude, representing "a pattern of continuous, highly-organized, systematic criminal extortion." Judge Barlow stated that as a sentencing judge he "obviously took the nature and circumstances of the offense into account when the petitioner was sentenced, and deliberately imposed a harsh penalty to reflect the seriousness of the crime." App. at 11. He concluded, however, that the Parole Commission had changed the rules of the game after sentence was pronounced, to-wit, "there now seems to be a very much heightened emphasis on 'the nature and circumstances of the offense.' *See, e.g.*, 28 C.F.R § 2.18 (1976). Compare 28 C.F.R. § 2.2 (1971) . . . ." App. at 10. As Judge Barlow observed in granting § 2255 relief —resentencing Addonizio for the precise time then spent in imprisonment—the Parole Commission did not take into consideration the prisoner's "excellent institutional record and a very low likelihood of recidivism."

Thus, it appears that the very "nature and circumstances of the offense" which generated a deliberate imposition of "a harsh penalty" are now being used by the Parole Commission to deny the parole which was anticipated in the imposition of the original penalty. Traditional standards of criminal justice reject this apparent double punishment for the same factor —one punishment imposed by the sentencing court, the other by the Parole Commission. Judge Barlow realized this, and fashioned his order accordingly. For this reason, we will affirm the judgment of Judge

Barlow granting relief to Addonizio under § 2255. "In our judgment, there can be no better evidence of a sentencing judge's expectations or intent than his own statement of those facts." *Sommers, supra*, 552 F.2d at 113. Judge Barlow stated in relevant part:

> The Court anticipated—assuming an appropriate institutional adjustment and good behavior while confined—that petitioner would be actually confined for a period of approximately three and one-half to your years of the ten year sentence, in view of the fact that he was a first-offender and that there appeared to be little probability of recidivism, given the circumstances of the case and his personal and social history. This sentencing expectation was based on the court's understanding—which was consistent with generally-held notions—of the operation of the parole system in 1970.
>
> * * * *
>
> . . . [T]he new emphasis on the nature and circumstances of the offense, in conjunction with other aspects of the new parole standards and procedures, has resulted in the frustration of this Court's sentencing expectations and intent.

App. at 10-11 (footnotes omitted).

The government would have us disregard the facial inequity of these circumstances by contending that Addonizio may not benefit from the *Salerno* rule, because here the Commission did not apply the guidelines (which would have released him after 26-36

months of incarceration) but instead applied a separate factor: "the offense behavior". The government's argument entirely misses the substance of Judge Barlow's position—at the time he sentenced Addonizio he assumed that the parole authorities would consider only institutional behavior and recidivism as parole factors, as then set forth in 18 U.S.C. § 4203; subsequently, the rules were changed; now an important factor is the "nature and circumstances of the offense." 28 C.F.R. § 2.18 (1976). Society cannot have it both ways; it cannot expose one to a harsh maximum—a ten-year term for what is considered to be a 26-36 month offense, and then, years later, for precisely the same reason which caused the harsh maximum to be imposed, impose a doubly harsh minimum.[10]

V.

In their appeals, Whelan and Flaherty similarly assert that the Parole Commission's denial of release based upon the nature of their offenses frustrates the intent of the sentencing judge. We first consider appeal No. 77-1621 from Judge Biunno's denial of § 2255 relief. We are disinclined to accept the invi-

[10] In *Musto* v. *United States*, 571 F.2d 136 (3d Cir. No. 77-1239), we declined an invitation to extend the rule of *Salerno* under circumstances where the sentencing court had knowledge of the existence of the new Parole Policy Guidelines. Addonizio, however, was sentenced under a widely-held belief that the Parole Board would not deny parole based on its independent assessment of the severity of the offense where the sentencing judge expressly based his sentence on the severity.

tation to examine the statements of Judge Shaw, the sentencing judge who is now deceased. We believe that this determination is for the district court in the first instance. Yet we are not content to accept Judge Biunno's examination of that transcript and conclusions thereafter reached. We believe that the § 2255 hearing judge should have the benefit of the rule this court announces today—that the *Salerno* rule does apply to sentences imposed pursuant to § 4202. Judge Biunno held otherwise, stating: "The *Silverman (Salerno)* case has no application here". Under these circumstances, the judgment of the district court must be vacated and the proceedings remanded.

Because the proceedings will be remanded, it is necessary to comment further on Judge Biunno's reasoning. We have heretofore delineated with specificity the issue to be determined in a § 2255 proceeding —whether there was a frustration of the intentions or the expectations of the sentencing judge by reason of new parole criteria. Judge Biunno's statement that "[t]he real issue is whether the Commission's denial of parole was arbitrary and capricious" was clearly wrong, for he confused the issue presented in a 28 U.S.C. § 2241 [11] proceeding, which was not properly

[11] § 2241. *Power to grant writ*

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

before him, with the § 2255 issue which was.

In contrast, the appeal of Whelan and Flaherty at No. 77-2373 is taken from Judge Muir's denial of relief under § 2241, and requires a review of the Parole Commission's determination. The proper standard of review was stated by Judge Muir:

> [T]he gist of this complaint is that the decision of the Parole Board to continue them past the amount of time that the guidelines suggest that they serve was without a rational foundation. In *Zannino* v. *Arnold*, 531 F.2d 637 [687] (3d Cir. 1976), the Court set forth the procedures to be followed by a district court in reviewing the sufficiency of a determination by the Parole Board to deny an inmate's request for release. The Court stated that 28 C.F.R. § 2.13 required that the Board furnish sufficient reasons for their decision to the inmate in order to afford him a chance to challenge the adequacy of those reasons. Once a sufficient statement has been given, the Court's function is to determine only if the Board abused its discretion and the relevant inquiry is "whether there is a rational basis in the record for the Board's conclusion." *Zannino*, 531 F.2d at 690-91.

(22a.)

We find no error in Judge Muir's application of the legal precepts to the record before him.

It bears emphasis, however, that the affirmance of Judge Muir's decision in the § 2241 proceeding is not *res judicata* as to the § 2255 proceeding which we

remand to Judge Biunno, for as previously emphasized, the thrust of the § 2255 proceeding is not a review of the Parole Commission's decision *per se*, but a *de novo* inquiry into whether there was a frustration of the sentencing court's intentions and expectations.

VI.

Accordingly, the judgment of the district court in the Addonizio case at No. 77-1541 and the judgment of the district court in the Whelan and Flaherty appeal at No. 77-2373 will be affirmed. The judgment of the district court at No. 77-1621 will be vacated and the cause remanded for reconsideration in light of the foregoing opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1542

HUGH J. ADDONIZIO

vs.

UNITED STATES OF AMERICA, APPELLANT

(D.C. Civil No. 76-2048)

On Appeal from the United States District Court
for the — District of New Jersey

Present: ALDISERT and HUNTER, *Circuit Judges*
and CAHN, *District Judge* *

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on January 12, 1978.

On consideration whereof, it is now here ordered and adjudged by this Court that the order judgment of the said District Court, filed April 27, 1977, be, and the same is hereby affirmed, with costs taxed against appellant.

ATTEST:

/s/ Thomas F. Quinn
Clerk

February 27, 1978

* Honorable Edward N. Cahn, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1621

WHELAN, THOMAS J., FLAHERTY, THOMAS M.

vs.

UNITED STATES OF AMERICA
THOMAS J. WHELAN and THOMAS J. FLAHERTY,
APPELLANTS

(D.C. Civil No. 76-2220)

On Appeal from the United States District Court
for the — District of New Jersey

Present: ALDISERT and HUNTER, *Circuit Judges*
and CAHN, *District Judge* *

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on January 12, 1978.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed March 11, 1977, be, and

* Honorable Edward N. Cahn, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

the same is hereby vacated, and the cause remanded for reconsideration in light of the opinion of this Court.

ATTEST:

/s/ Thomas F. Quinn
Clerk

February 27, 1978

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-2373

THOMAS J. WHELAN, #73405-158
THOMAS M. FLAHERTY, #73404-158, APPELLANTS

vs.

FLOYD E. ARNOLD, Warden, U.S. Penitentiary, Lewisburg, Pa. and MAURICE H. SIEGLER, Chairman, United States Board of Parole

(D.C. Civil No. 77-373)

On Appeal from the United States District Court for the Middle District of Pennsylvania

Present: ALDISERT and HUNTER, *Circuit Judges* and CAHN, *District Judge* *

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel on January 12, 1978.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said

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* Honorable Edward N. Cahn, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

District Court, filed September 29, 1977, be, and the same is hereby affirmed, with costs taxed against appellants.

ATTEST:

/s/ Thomas F. Quinn
Clerk

February 27, 1978

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-2048

[Filed Apr. 27, 1977]

HUGH J. ADDONIZIO

v.

UNITED STATES OF AMERICA

OPINION

BARLOW, *District Judge.*

This is a motion for vacation of sentence and for resentencing pursuant to 28 U.S.C. § 2255 (1971). The petitioner, Hugh J. Addonizio, was convicted of one count of conspiracy and sixty-three (63) counts of extortion.[1] On September 22nd, 1970, this Court imposed a term of imprisonment of ten years and a fine of $25,000.00, pursuant to 18 U.S.C. § 4202 (1969).[2] The petitioner commenced service of his sentence on March 6th, 1972.

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[1] *See generally United States* v. *Addonizio*, 313 F. Supp. 486 (D.N.J. 1970), *aff'd*, 451 F.2d 49 (3d Cir. 1971), *cert. denied*, 405 U.S. 936 (1972).

[2] The provisions of former § 4202 were changed somewhat by the Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 219 (1976), but the changes are not relevant to this case. The sentencing provision of former § 4202 is now contained in 18 U.S.C. § 4205(a) (Supp. 1977).

At the time sentence was imposed, this Court expected that petitioner would receive a meaningful parole hearing—that is, a determination based on his institutional record and the likelihood of recidivism [3] —upon the completion of one-third (⅓)[4] of his sentence. The Court anticipated—assuming an appropriate institutional adjustment and good behavior while confined—that petitioner would be actually confined for a period of approximately three and one-half to four years of the ten-year sentence,[5] in view of the

[3] Prior to 1973, it was generally understood that the Parole Board based its decisions primarily upon institutional behavior and the probability of recidivism. *See, e.g., United States* v. *Somers,* No. 76-2009, slip op. at 8-9 (3d Cir., filed Feb. 25, 1977) (remarks of sentencing judge); *United States* v. *Salerno,* 538 F.2d 1005, 1007 (3d Cir. 1976); 18 U.S.C. § 4203 (1969). Prior to 1970, the Board relied on the three "statutory criteria": (1) observation of the rules of the institution in which the prisoner is confined: (2) a reasonable probability that the prisoner will live and remain at liberty without violating the laws; and (3) release not incompatible with the welfare of society. *See* 28 C.F.R. § 2.2 (1971). During 1970, the Board adopted a table of additional factors to supplement the statutory criteria. *See* The United States Board of Parole, *Biennial Report: July 1, 1968 to June 30, 1970,* at 21-22 (1971). This Court was not familiar with the existence or the potential impact of these additional factors at the time the petitioner was sentenced—September, 1970. The guideline system in effect since 1973 also was not within the contemplation of the Court when the petitioner was sentenced in 1970.

[4] *See* 18 U.S.C. § 4202 (1969); note 2 *supra.*

[5] The Court expected and intended that the petitioner would serve slightly more than one-third of his sentence. The one-third figure with which this Court was familiar in 1970 was a generally accepted estimate, *see Berry* v. *United States,* 412

fact that he was a first-offender and that there appeared to be little probability of recidivism, given the circumstances of the case and his personal and social history. This sentencing expectation was based on the Court's understanding—which was consistent with generally-held notions [6]—of the operation of the parole system in 1970.

Subsequent to the imposition of sentence upon the petitioner, new standards and procedures were adopted for use in parole determinations. *See, e.g., United States* v. *Salerno,* 538 F.2d 1005, 1007 (3d Cir. 1976); Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 219 (1976) [codified in 18 U.S.C. § 4201 *et seq.* (Supp. 1977)]. For example, in addition to consideration of the institutional record and the probability of recidivism, there now seems to be a very much heightened emphasis on "the nature and circumstances of the offense." *See, e.g.,* 28 C.F.R. § 2.18 (1976). *Compare* 28 C.F.R. § 2.2 (1971); note 3 *supra.*

It is clear that this new emphasis has had a substantial adverse impact on the petitioner's eligibility for parole. He has now served more than one-half of his ten-year sentence and has twice been denied parole, despite his excellent institutional record and a very low likelihood of recidivism. Both denials were

F.2d 189, 192 (3d Cir. 1969), and was even acknowledged by the Parole Board, *see* The United States Board of Parole, *supra* note 3, at 23.

[6] *See* notes 3-5 *supra.*

predicated primarily on the nature and circumstances of the petitioner's offense. *See United States ex rel. Addonizio* v. *Arnold*, 423 F. Supp. 189, 190 n.4 (M.D. Pa. 1976); Supplemental Brief for Petitioner, Exhibit A.

Thus, it is obvious that the petitioner has not received the type of meaningful parole hearing contemplated by the Court at the time of sentencing.[7] The Court obviously took the nature and circumstances of the offense into account when the petitioner was sentenced, and deliberately imposed a harsh penalty to reflect the seriousness of the crime. The Court did not expect that those particular facts would continue to have an impact on the length of time served by the petitioner. In other words, the Court did not anticipate that the Parole Commission would place such an emphasis on those particular facts that they would become obstacles to the petitioner's release on parole.

Thus, the new emphasis on the nature and circumstances of the offense, in conjunction with other aspects of the new parole standards and procedures, has resulted in the frustration of this Court's sentencing expectations and intent. The only real issue presented upon this motion is whether 28 U.S.C. § 2255 (1971) provides jurisdiction to challenge a sentence imposed under 28 U.S.C. § 4202 (1969) prior to the adoption of the new parole standards and procedures, when the intent of the sentencing judge is frustrated by the application of those standards

[7] *See* note 3 & accompanying text *supra*.

and procedures. It has been held that § 2255 is available to modify sentences where the import of the judge's sentence has in fact been changed by standards and procedures adopted subsequent to the imposition of the sentence. *See, e.g., United States* v. *Somers*, No. 76-2009 (3d Cir., filed Feb. 25, 1977);[8] *United States* v. *Salerno*, 538 F.2d 1005, *rehearing denied*, 542 F.2d 628 (3d Cir. 1976). However, the Government contends that this proposition should be limited to sentences imposed under 28 U.S.C. § 4208 (a)(2) (1969),[9] and should not be extended to sentences imposed under § 4202.

The Government's contention must be rejected. At least one other judge in this district has already extended the *Salerno* principle to a sentence imposed under § 4202. *See Pernetti* v. *United States*, Civ. No. 76-2369 (D.N.J., filed Mar. 3, 1977).[10] Furthermore, the only distinction between § 4202 and § 4208(a)(2) is the *timing* of the first parole hearing. There is nothing to indicate that the frustration perceived in *Salerno* and *Somers* related only to the timing of the parole hearing. Rather, those cases were primarily concerned with the meaningfulness of the hearing, once it was held. The crucial element was the frustration of the sentencing Judge's reasonable expectations as to the form and content and, consequently,

[8] 20 Crim. L. Rptr. 2545.

[9] The sentencing provision of former § 4208(a)(2) is now contained in 18 U.S.C. § 4205(b)(2) (Supp. 1977).

[10] 21 Crim. L. Rptr. 2033.

the likely outcome, of the hearing process. The possibility of such frustration is obviously not limited to sentences under § 4208(a)(2), because the new parole standards and procedures apply to both § 4202 sentences and § 4208(a)(2) sentences. Therefore, the holding of *Salerno* and *Somers* cannot logically be confined to cases involving § 4208(a)(2).

Having held that the doctrine of *Salerno* and *Somers* may be extended to sentences imposed under § 4202, and having found that that doctrine is applicable to the present case by reason of the frustration of the Court's original sentencing intent, this Court has a responsibility to correct the petitioner's sentence; indeed, the Court's judicial conscience demands that result.[11] Accordingly, the petitioner's sentence will be vacated and he will be resentenced to time served. An appropriate order will be submitted.

/s/ George H. Barlow
GEORGE H. BARLOW
United States District Judge

[11] It should be noted that one of the petitioner's co-defendants, who received precisely the same sentence as petitioner, was released on parole in March, 1976, after having served four years—slightly more than one-third—of his ten-year sentence.

APPENDIX F

UNITER STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civ. No. 76-2220, Cr. 567-70

THOMAS J. WHELAN and THOMAS M. FLAHERTY, PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

March 3, 1977

OPINION

BIUNNO, District Judge.

This is the second application made by Whelan and Flaherty seeking release under 28 U.S.C. § 2255 or, in the alternative, for resentencing under 18 U.S.C. § 4208 (now 4205). A summary of the prior proceedings is appended to this opinion for convenience. An analysis of the evidence adduced against them and their co-defendants in the conspiracy/extortion trial (Cr. 570-70) is fully set forth in *U.S.* v. *Kenny*, 462 F.2d 1205 (CA-3, 1972).

Suffice it to say here that the evidence established the existence of a deliberate, thoroughly organized and fully executed scheme and practice, on the part of public officials, to extort money from persons doing business with the City of Jersey City and the County of Hudson, with arrangements to share the loot among the participants.

Among other items, the evidence showed cash totalling $700,000 being used to buy bearer bonds for John V. Kenny, with the assistance of one Sternkopf (who was supposed to be the independent city auditor) to conceal the source of the money and the ownership of the bonds. It showed that Whelan and Flaherty arranged to open "numbered" bank accounts in a Florida bank, in which cash and bearer bonds totalling more than $1.2 million was deposited to their credit. See, for example, "The J. V. Kenny Bonds", discussed at 462 F.2d pp. 1219 to 1220, and "The Whelan and Flaherty Accounts", discussed at 462 F.2d pp. 1220 to 1221, including the fact that 4 checks totalling more than $84,000 had not been negotiated as of June 22, 1971.

No serious argument can be made that the 15 year jail sentences were unduly harsh, or even that they are not proper sentences. No claim can be advanced that Whelan and Flaherty were "Robin Hoods", taking from the rich to aid the poor. On the contrary, since the extorted funds could only come from the public treasury, what they did was to rob the poor to enrich themselves and their cohorts. Judge Shaw

fully appreciated this and made explicit reference to it at sentence time.

For the most part, what is argued now is a rehash of what was argued before Judge Shaw on the Rule 35 motion, and what was argued in the 1973 motion under 28 U.S.C. § 2255. Both motions were denied, and the denials were affirmed as noted in the attached Summary. As provided in 28 U.S.C. § 2255, "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." The provision is a salutary one, and this court adheres to it.

The only point that is new is that the denial of parole by the Parole Commission is a frustration of Judge Shaw's intent when he imposed the 15 year sentences. This claim is grounded on *U.S.* v. *Salerno, Appeal of Silverman*, 538 F.2d 1005 (CA-3, 1976), *reh. den.* 542 F.2d 628 (CA-3, 1976). The issue so raised is whether this court, as a sentencing court, has any jurisdiction at all under 28 U.S.C. § 2255, or whether the only remedy available to the prisoner is by writ of habeas corpus under 28 U.S.C. § 2241, before the district court having jurisdiction over their place of incarceration, namely, the Middle District of Pennsylvania.

In that sense, the real issue is whether the Parole Commission's denial of parole was arbitrary and capricious. There is no doubt in this court's mind that the Commission's denial was affected, at least in part, by its concern that the wide public knowledge of the

existence of the $1.2 million of loot withdrawn from the Florida bank, coupled with complete silence about its subsequent history, would preclude an affirmative finding that release on parole would not "depreciate the seriousness of his offense or promote disrespect for the law", 18 U.S.C. § 4206(a)(1), as added by Pub.L. 94-233, sec. 2.

The spectacle of Whelan and Flaherty being paroled and free to escape with their ill-gotten gains to some Costa Rican or other haven, to luxuriate in comfort, may have been more than the Parole Commission could stomach. But that question, if it has substance, is for a proceeding under 28 U.S.C. § 2241 in the Middle District of Pennsylvania. This court lacks jurisdiction to decide it. If it could, it would find the action of the Parole Commission proper, since the spectacle is revolting.[1]

The *Silverman* case has no application here. It involved what was obviously intended to be a "light" sentence of 3 years, imposed under 18 U.S.C. § 4208(a)(2) [now 4205(b)(2)]. The parole guidelines, adopted after sentence, reflected the retrospective,

[1] At the hearing of January 10, 1977, counsel presented some argument based on statements made on questions asked at the parole hearing. These could not be considered without a transcript, and arrangements were made to secure the sound recording tapes, from which counsel has prepared a partial transcript. After this had come in, the court asked both sides whether any further argument or submission was desired in light of the added material. Both sides have independently informed the court that they rest on the argument and submissions already made.

statistical distribution on a Gaussian curve of the range of time in jail for that offense. The question would have better been decided as a review of parole action under 28 U.S.C. § 2241, but the consequences of the new guidelines were so much in contrast to the sentence imposed, in light of the explicit statement of the sentencing judge, that the Court of Appeals was moved to bring the issue within 28 U.S.C. § 2255. It made clear, however, that the circumstances of the case were unique, and that the decision did not establish the sentencing court as a super parole board.

Whatever the soundness of *Silverman* and like decisions may be, no basis for enlarging this court's jurisdiction is shown. The guidelines in these cases show no more than that thieving public officials in the past probably have gotten off too lightly. Judge Shaw's sentencing statements, and his denial of the Rule 35 motion, show that he had no intention of continuing that practice. The "way of life" which was reflected in the evidence was rotten to the core, and Judge Shaw clearly intended, by his sentences, to try to bring it to an end.[2]

[2] Even if there were jurisdiction here, and even if this court were inclined to "release Whelan and Flaherty now" (which it is not), a resentencing now would inevitably frustrate Judge Shaw's intent on sentencing. A resentencing to "time served", for example, would release them free of parole supervision for the remainder of the 15 years, and thus deprive the parole commission of the means to impose such conditions on parole as the cases call for under 18 U.S.C. § 4209 [1976].

[Footnote continued on page 38a]

This court is satisfied, from a detailed review of the materials, that Judge Shaw would have experienced no sense of frustration at all from the denial of parole. At the time of sentencing, Whelan and Flaherty had to serve one-third of the 15 year sentences before being *eligible* to apply. Under that law, given full credit for "good time" allowances, they would not be entitled of right to be paroled until they had served somewhat more than 75% of their sentences. Under the 1976 amendments, they must be released on parole after serving ⅔ of their sentences, absent certain affirmative findings, 18 U.S.C. § 4206(d), as added by P.L. 94-233, sec. 2.

Being eligible, of course, merely allows the application to be made, but the grant of parole is a different matter which, as this court noted in its earlier ruling, is a matter placed by the Congress in the hands of the parole commission, where it belongs.

This is not a case which resembles *Silverman*, or like cases, where a unique aspect or narrow circumstances leads to a frustration of the intention of the sentencing judge. As the Court of Appeals observed, the sentences imposed on the various defendants in this case recognized the varying levels of participa-

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[2] [Continued]

The only suitable mechanism that appears to exist for this case is that set forth by 18 U.S.C. § 4205(g) [1976], under which the Bureau of Prisons may move the sentencing court to reduce the *minimum* term to the time the defendant has served. There has been no such motion by the Bureau, and hence no jurisdiction under that provision.

tion in the conspiracy. See 462 F.2d 1218, footnote 7, and the array of sentences listed in 462 F.2d 1210, footnote 1. The range runs from the straight 15 year sentences imposed on three participants, down to a probationary sentence. In no instance did Judge Shaw employ the options under former 18 U.S.C. § 4208(a)(1) or (a)(2) [now 4205(b)(1) and (b)(2)], and nothing presented or reviewed carries the slightest suggestion that a denial of parole on the first eligible application embodies any frustration of his intent.[3]

The presentation made here is also eloquent by its silence. Great emphasis is placed on the fact that Judge Shaw regarded the decision to withdraw the appeals and to plead guilty to the income tax charges as indicating that the first step had been taken on the long road to earning a return to society. He gave weight to that when he imposed a concurrent 5 year sentence, which has already run out, and imposed a fine of $10,000, which has not been paid. There is not another word of other steps taken on the long road.

The convictions are final, and the statute of limi-

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[3] And see *U.S.* v. *Somers* (*Ponzio, Appellee*), decided February 27, 1977 by the Court of Appeals, Third Circuit, No. 76-2009, emphasizing that the scope of *Silverman* will not be relaxed or departed from, and that it is to be limited to cases where sentence is imposed under 18 U.S.C. 4208(a)(2) [now 4205(b)(2)], and where the intention at sentence time is later thwarted by the guidelines. Other reasons for dissatisfaction with the parole commissions action are not a basis for the invoking of Silverman. See, especially, III, of that opinion.

tations has doubtless run on other wrongdoings, if there were any. Yet Whelan and Flaherty evidently feel bound by the code of silence which is commonly part of an organized criminal conspiracy like this, not only about their $1.2 million of loot but also about the inside details, the working and machinery, by which the conspiracy was carried out. A baring of these details might impress a parole commission that the change of attitude has passed beyond the first step, but there is only silence.

The court accordingly finds that none of the criteria specified by 28 U.S.C. § 2255 for the granting of relief thereunder appear to exist, and there is no ground for release, or for vacating, modifying or correcting the sentences imposed.

APPENDIX

SUMMARY OF EARLIER PROCEEDINGS

U.S. v. *Whelan and Flaherty*

(Conspiracy and extortion, Cr. 567-70)

(Income tax evasion, Cr. 568-70; 570-70)

August 10, 1971. Whelan and Flaherty sentenced on verdict of guilty on 2 counts of conspiracy and 27 counts of extortion. General sentence of 15 years imposed by Judge Shaw. Bail pending appeal set at $400,000.

December 6, 1971. Whelan and Flaherty retracted pleas of not guilty and entered pleas of guilty on the separate income tax evasion

indictments. Appeals from convictions in Crim. 567-70 withdrawn.

February 17, 1972. Whelan and Flaherty sentenced on pleas of guilty on income tax indictments. General sentence of 5 years and $10,000 fine imposed on each by Judge Shaw, term sentences to be concurrent with 15 year terms on conspiracy and extortion convictions.

May 16, 1972. Motions of Whelan and Flaherty for reduction of 15 year sentences in Crim. 570-70, pursuant to F.R.Crim.P. 35, denied by Judge Shaw.

December 8, 1972. Denials of Rule 35 applications by Judge Shaw affirmed by Court of Appeals. CA #72-1588 and 1589.

December 12, 1973. Applications of Whelan and Flaherty for reduction of their 15 year sentences, under 28 U.S.C. § 2255 or, in the alternative, for resentencing under 18 U.S.C. § 4208, denied by Judge Biunno.

September 11, 1974. Judgment of Judge Biunno denying relief affirmed by Court of Appeals, CA #74-1127.

June 3, 1976. Hearing held at Lewisburgh on applications for parole.

July 12, 1976. Parole applications denied.

October 18, 1976. Hearing held on appeal before National Appellate Board. Appeals denied.

November 22, 1976. Motion filed in U.S. District Court, Civ. 76-2220, for release of Whelan and Flaherty from custody under 28 U.S.C. § 2255, or in the alternative to modify or alter the sentences under 18 U.S.C. § 4208 (now sec. 4205).

January 10, 1977. Hearing held on motion. Decision reserved pending receipt of transcript of hearing of October 18, 1976 before National Appellate Board.

February 4, 1977. Partial transcript of October 18, 1977 hearing received.

APPENDIX G

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 77-373

Petition Filed 5/4/77

(Judge Muir)

[Filed Williamsport, Pa., Sep. 29, 1977]

THOMAS J. WHELAN and THOMAS N. FLAHERTY, PLAINTIFFS

vs.

FLOYD E. ARNOLD, et al., DEFENDANTS

OPINION

MUIR, District Judge.

Petitioners Whelan and Flaherty have filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 alleging that the actions of the United States Parole Commission denying their application for parole violated their rights. On May 4, 1977, Petitioners filed a memorandum of law in support of their petition. On May 25, 1977, Respondents filed an answer to this Court's show cause order. Whelan and Flaherty filed a reply brief on June 10, 1977.

Petitioners are both serving 15 year sentences for violations of 18 U.S.C. §§ 1951 and 1952 and 26 U.S.C. § 7206(1), conspiracy to extor and income tax evasion, which were handed down on October 10, 1971

by the Honorable Robert Shaw, former United States District Judge for the District of New Jersey. Motions for reduction of sentence pursuant to F. R. Crim. P. 35 and for vacation of sentence pursuant to 28 U.S.C. § 2255 were denied by that Court. Both petitioners became eligible for parole after serving one-third of their sentence and a parole hearing was held at Lewisburg Penitentiary on June 3, 1976. On July 12, 1976 the Parole Board denied the application for parole and continued them for a further hearing in 1978. That action was affirmed by the National Appellate Board on October 19, 1976. Petitioners contend that the decision of the Parole Board had no rational basis in the record and therefore that they should be granted their release. They further contend that the Parole Board's decision to continue them beyond the guidelines recommended for inmates with their salient factor score and who have committed an offense of very high severity set forth in 20 C.F.R. § 2.20 frustrated the intent of the sentencing judge and constitutes a ground for re-sentencing.

A sentence can be set aside and an inmate remanded for resentencing if the actions of the Parole Board are so inconsistent with the intent of the sentencing judge that he would not have imposed the sentence which he handed down if he were aware of the actions which the Parole Board would have taken. The principle was applied in United States vs. Salerno (appeal of Silverman), 538 F.2d 1005 (3d Cir. 1976), where Silverman, the Defendant, had been sentenced

under former 18 U.S.C. § 4208(a)(2). After Silverman's sentencing, the Parole Board's regulations changed to the present guideline system. At his Parole hearing, the Board followed the guidelines which indicated that Silverman was to serve his entire sentence. He then brought an action under 28 U.S.C. § 2255 and the Court of Appeals noted that the trial judge's intention in sentencing Silverman under § 4208(a)(2), which allows an inmate to become eligible for parole immediately upon the commencement of his sentence, suggested that he should not serve the entire term. Therefore, the decision of the Parole Board to continue him to the expiration was contrary to the intent of the sentencing judge and would be set aside. Petitioners also cite Addonizio vs. United States, No. 76-2048 (D.N.J. April 27, 1977), which involved a sentence imposed under 18 U.S.C. § 4202, the same provision under which Petitioners were sentenced. The Court stated that at the time sentence was imposed it was expected that Addonizio would receive a meaningful parole hearing upon the completion of one-third of his term and that a determination of whether he should be released would be based upon his institutional record and the likelihood of recidivism as set forth in the then existing parole criteria. Subsequent to that time, the guideline system now in effect was adopted. Addonizio was denied parole at the one-third point of his sentence on different factors, including the nature and circumstances of his offense. The sentencing Court felt that its intention had been

frustrated by the application of these guidelines to Addonizio and consequently vacated his sentence and resentenced him to time served.

Both *Salerno* and *Addonizio* involved § 2255 motions addressed to the sentencing Court. The Petitioners brought this claim to the sentencing court's attention through a § 2255 motion but, in Whelan vs. United States, 427 F.Supp. 379 (D. N.J. 1977), that Court held that it did not have jurisdiction because "the real issue is whether the Parole Commission's denial of parole was arbitrary and capricious." That decision is not binding on this Court for purposes of conferring jurisdiction over the Petitioners' first claim under 28 U.S.C. § 2241, however.

In application of Galante, 437 F.2d 1164, 1165 (3d Cir. 1971), the Court stated that § 2255 requires a prisoner to exhaust his remedies in the sentencing court before bringing a habeas corpus action, including appealing a denial of relief to the Court of Appeals and petitioning for a writ of certiorari from the Supreme Court. *See also* Crismond vs. Blackwell, 333 F.2d 374, 377 (3d Cir. 1964); Deitle vs. United States No. 76-1359 (M.D. Pa. February 16, 1977). Had petitioners done so in this case, it appears that the Court of Appeals would have held that the sentencing court had jurisdiction to hear contentions based upon *Salerno* under § 2255. *See, e.g.*, United States vs. Somers, 552 F.2d 108, 113 n. 9 (3d Cir. 1977); United States vs. Salerno, 538 F.2d 1005, 1008 n. 4 (3d Cir. 1977).

The Court is reluctant to deny consideration to Petitioners' claim and force them to apply again to the sentencing court for relief. However, this Court may not entertain a habeas corpus petition unless the Petitioners' § 2255 remedy is inadequate or ineffective, and this requirement is jurisdictional. *See* Application of Galante, 427 F.2d 1164 (3d Cir. 1971); 28 U.S.C. § 2255. Therefore, Whelan and Flaherty's contentions based upon *Salerno* will be dismissed.

Whelan and Flaherty's second contention, and the gist of this complaint, is that the decision of the Parole Board to continue them past the amount of time that the guidelines suggest that they serve was without a rational foundation. In Zannino vs. Arnold, 531 F.2d 637 (3d Cir. 1976), the Court set forth the procedures to be followed by a district court in reviewing the sufficiency of a determination by the Parole Board to deny an inmate's request for release. The Court stated that 28 C.F.R. § 2.13 required that the Board furnish sufficient reasons for their decision to the inmate in order to afford him a chance to challenge the adequacy of those reasons. Once a sufficient statement has been given, the Court's function is to determine only if the Board abused its discretion and the relevancy inquiry is "whether there is a rational basis in the record for the Board's conclusion." *Zannino*, 531 F.2d at 690-91. *See also* Manos vs. United States Board of Parole, 399 F.Supp. 1103, 1105 (M.D. Pa. 1975). Therefore, the Court

must examine the statement of reasons furnished by the Parole Board to Whelan and Flaherty in order to determine whether a rational basis for the decision, as indicated by those reasons, existed.

The Board's full statement of reasons reads as follows:

> "Your offense behavior has been rated as very high severity. You have a salient factor score of 11. You have been in custody a total of 59 months. Guidelines established by the Commission for adult cases which consider the above factors indicate a range of 26-36 months to be served before release for cases with good institutional program performance and adjustment. After a review of all relevant factors and information presented, a decision above the guidelines at this consideration appears warranted because your offense was part of a large scale, organized criminal conspiracy and an ongoing criminal enterprise, according to presentence investigation dated July 30, 1971. In addition, the offense committed involved a violation of public trust."

Petitioners contend, citing Diaz vs. Norton, 376 F.Supp. 112 (D.Conn. 1974), that the Parole Board erred in taking into account the severity of the offense both in determining what the guideline range should be and in making a decision to continue Petitioners past the guideline.

In Diaz vs. Norton, 376 F.Supp. 112, 115 (D. Conn. 1974), the Court stated that a decision to continue

an inmate beyond the guidelines set forth in 28 C.F.R. § 2.20 based only upon the fact that release at that time would "depreciate the seriousness of the offense" was impermissible. The Court noted that the two most important factors in determining the guideline range were the inmate's salient factor score and the severity of the offense which he had committed. Therefore, a decision outside the guideline range could not be made based upon the same factors which were used to compute the guideline range. This does not preclude the parole board from considering other evidence in making its decision to deny an inmate release.

It is this Court's view that the decision of the Parole Board in this case was based upon reasons which it properly considered and which did not go into the formulation of the Parole Board's guidelines. There is clearly a difference in the offenses which are labelled as of "very high severity" under the Parole Board's guidelines. The Board may properly consider aggravating factors which relate to the commission of offenses within that category. The Board may consider, for example, the fact that permanent physical damage was done to a victim of the crime, see Hill vs. Attorney General, 550 F.2d 901, 902 (3d Cir. 1977), (per curiam), or that in addition to the offense committed, there was "evidence of a large scale conspiracy," see Foddrell vs. Sigler, 418 F.Supp. 324, 325 (M.D. Pa. 1976). *See generally* Manos vs. United States Board of Parole, 399 F.Supp. 1103 (M.D. Pa. 1975). Whelan and Flaherty were involved

in a large scale scheme to extort money from Jersey City taxpayers. There are indications in the record that some of the extorted monies were still aavilable to them upon their release. Further, both held positions of extremely high public trust, mainly the mayor and councilman of Jersey City, respectively. The Parole Board could properly conclude, based upon these considerations, that an exception should be made even though the underlying offense fit within the "very high severity" category and both petitioners had extremely good salient factor scores. While the guidelines are followed in a large majority of cases, see United States vs. Salerno, 538 F.2d 1005 (3d Cir. 1976), the Board should not be bound by guidelines when the circumstances of the crime are exceptional. The Court feels that the crimes committed by Whelan and Flaherty could properly have been considered as exceptional and that the circumstances surrounding their commission were properly taken into account in making a decision to continue them above the guidelines. Therefore, since a rational basis for the Board's decision exists, it will not be disturbed. Zannino vs. Arnold, 531 F.2d 687 (3d Cir. 1976).

An appropriate order will be entered.

/s/ Muir
MUIR
U.S. District Judge

DATED: September 29, 1977

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 269219 67

No. 78-156

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

HUGH J. ADDONIZIO

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS J. WHELAN AND THOMAS M. FLAHERTY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-156

UNITED STATES OF AMERICA, PETITIONER

v.

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v.

THOMAS J. WHELAN AND THOMAS M. FLAHERTY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

We file this memorandum to advise the Court of developments in the case of respondents Whelan and Flaherty.

We did not seek a stay of the judgment of the court of appeals in this case, and so the district court began the remand proceedings required by the court of appeals. Before the district court had issued its order, however, the Parole Commission decided to release respondents Whelan and Flaherty on parole. See Pet. 15 n. 10a. The district court then filed an opinion stat-

ing that the case was moot because respondents had received adequate relief (App. A, *infra,* pp. 5–10). The court's opinion also questioned the assumptions of the court of appeals (see Pet. App. 11a) concerning the amount of time prisoners sentenced during or prior to 1970 could expect to serve before release on parole. Judge Biunno computed the length of time that persons sentenced by Judge Shaw had served; the computations established that many persons sentenced during or prior to 1970 had served a good deal more than one-third of their sentences.

Both the United States Attorney and counsel for respondents Whelan and Flaherty then wrote to Judge Biunno, stating their positions that the release of respondents on parole would not make the case moot. See Pet. 15 n. 10a. Judge Biunno wrote a further opinion (App. B, *infra,* pp. 11–14), stating that, although the case was not moot "in the usual sense" (*id.* at 11), there was no need to pass on respondents' motions for reduction of sentence.

Before learning of Judge Biunno's second opinion, the Parole Commission had voted to defer the release of respondents Whelan and Flaherty pending completion of further investigation. Information in the possession of the Commission indicated that respondents had not been entirely candid with the Commission concerning the status of the monies respondents had wrongfully obtained. The Commission set a hearing for October 1978 to consider rescission of respondent's parole.

Respondents Whelan and Flaherty promptly requested the district court to reinstate and grant their motions for reduction of sentence, Judge Biunno vacated his earlier decisions concerning mootness, and on August 23, 1978, reduced the sentences of respondents (Apps. C and D, *infra,* pp. 15–20). Judge Biunno did not write an opinion explaining this reduction.[1] The terms of the new sentence required the immediate release of respondents Whelan and Flaherty on accumulated good time credits. We have been informed that respondents Whelan and Flaherty plan to seek further judicial review of the terms of their sentence reduction and release. As required by Judge Biunno's order, however, both respondents now have been released.

The further proceedings on remand, and the release of respondents Whelan and Flaherty pursuant to the district court's order, do not affect this case or make it moot. See *Mancusi* v. *Stubbs,* 408 U.S. 204, 205–207 (1972); *Commissioner* v. *Shapiro,* 424 U.S. 614, 624 n.9 (1976). If, as we argue, the courts do not have authority to revise lawful sentences in response to parole decisions or changes in parole policies, then this Court should reverse the judgment of the court of appeals; the effect of that reversal—like the effect of the reversal we seek in the case of respondent Addonizio, who was initially released by the district court—

[1] Judge Biunno gave an oral statement of reasons. We have ordered but have not yet received a copy of the transcript.

would be to annul the revisions in the sentences and to restore the original sentences.[2]

In sum, the further proceedings in the district court have not mooted the case or reduced the need for review of the court of appeals' decision. Indeed, to the extent that the proceedings on remand concerning respondents Whelan and Flaherty are relevant at all, they illustrate our contention that the court of appeals' rule simply enables district courts to review parole decisions with which they may disagree. For the reasons we have set out in the petition, we believe that courts may not do so, and that the issue should be addressed by this Court.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

SEPTEMBER 1978.

[2] Even if respondents were paroled or mandatorily released by the Commission, they would be in parole status if the court of appeals decision were reversed. If, on the other hand, there were a reduction of their sentence to time served, as they seek, or to some other maximum less than that originally imposed by Judge Shaw, their period of parole supervision would be shortened or eliminated.

APPENDIX A

United States District Court for the District of New Jersey

Civ. 76–2220 (Cr. 567–70)

UNITED STATES
v.
THOMAS J. WHELAN AND THOMAS FLAHERTY

Memorandum

BIUNNO, *District Judge*

Pursuant to mandate of the Court of Appeals after the decision in *Addonizio* v. *U.S.* (Appeals of Whelan and Flaherty), 573 F. 2d 147 (CA–3, 1978), the dismissal of the motions of Whelan and Flaherty for reduction or modification of sentence under 28 USC § 2255 was reversed, and the matter remanded for reconsideration because in this court's ruling, 427 F. Supp. 379 (D–N.J., 1977), it had taken the law to be that there was no jurisdiction.

At the time of the initial ruling, the Court of Appeals had found § 2255 jurisdiction, after the 120 limit set by Rule 35, by collateral attack on the ground that application by the Parole Commission of the guidelines that took effect in late 1973 frustrated the expectations and intentions of the sentencing judge, in very limited circumstances.

The first case, *U.S.* v. *Salerno,* 538 F. 2d 1005 (CA–3, 1976) involved a defendant sentenced to 3 years, with parole eligibility under 18 USC § 4208(a)(2) [now, § 4205(b)(2)], before the guidelines existed. Be-

cause of delay for appeal of his conviction, the defendant did not start serving his sentence until July 1, 1974. He was told then that these indicated 45 to 55 months of incarceration (longer than his entire sentence).

On petition for *rehearing,* 542 F. 2d 628 (CA–3, 1976) it was emphasized that the holding was a narrow one, applicable only to sentences setting eligibility for parole under § 4208(a)(2), and that motions under § 2255 did not vest the courts with power of a super parole board.

The second case, *U.S.* v. *Somers,* 552 F. 2d 108 (CA–3, 1977) also involved § 4208(a)(2) parole eligibility, and the court restated "the admonition * * * that the * * * doctrine is a most narrow and inelastic principle which will not be expanded beyond its strict confines," 552 F. 2d at 114.

In the third case, *U.S.* v. *Solly,* 559 F. 2d 230 (CA–3, 1977) the *Salerno* doctrine was extended to a sentence with parole eligibility established under § 4201(a)(1).

Application of the *Salerno* doctrine was barred, by *Musto* v. *U.S.,* 571 F. 2d 136 (CA–3, ——) in a case where the judge was aware of the parole guidelines at the time of sentence.

In *Addonizio,* for the first time, the Salerno doctrine was extended to any case of frustration of the original intention and expectation of the sentencing judge by the application of later-adopted guidelines, regardless of the source of parole eligibility, whether under § 4202, § 4208(a)(1) or § 4208(a)(2).

Since hearing the parties after remand, in regard to the nature and scope of the reconsideration to be made, the court has been informed that the Parole Commission granted parole to both Whelan and Flaherty for

a date in August, 1978. That action renders moot any further action here, and an order to that effect will be entered.

It may be useful to record the results of an analysis of data compiled in respect to sentences imposed by the late Judge Robert Shaw, who imposed sentence in this case, during his service here, even though the present motion is moot.

What was done involved having the clerk identify all sentences imposed by Judge Shaw for terms of 5 years or more, and then have gathered information showing the date when service of each sentence began and the date when each defendant was released from custody, on parole or otherwise.

Given the starting and release dates, the number of days served was determined with a Hewlett-Packard HP–80 calculator with a programmed calendar to the year 2100 AD. The number of days served was divided by 365 and multiplied by 12 to convert the time served to months, and the result was then divided by the term sentence (in months) to obtain the percentage of the sentence imposed that was served.

In one case, the defendant was credited with time served before sentence, and this was added to the time served after sentence to obtain total time served.

In several cases the defendant is still in custody, and in such cases the time served and percentage of sentence served was calculated to June 30, 1978 to reflect time and percentage served to that date.

The tabulation set out below presents the results of these calculations, arranged in an order to reflect a sequence running from the smallest to the largest percentage. For each entry, only the criminal docket number is shown without giving the name of the par-

ticular defendant, in order to provide the statistical data without intruding into the privacy rights of any individual.

For each entry, the sentence imposed is expressed in months, as is the time served. The basis for release (i.e., parole granted, mandatory release, full term, executive clemency, etc.) is noted for each entry.

Judge Shaw did not specify parole eligibility under § 4208(a)(1) in any of these cases. He specified parole eligibility under 4208(a)(2) in only two cases, one a sentence for 20 years and the other a sentence for consecutive terms totaling 30 years. In three cases, straight sentences imposed by Judge Shaw were modified after his death by another judge to specify parole eligibility under § 4208(a)(2); all three were so modified before the parole guidelines took effect in December, 1973. In one of the three, the surviving judge also reduced the term from 10 years to 8 years. All of these instances are identified in the tabulation.

The dates were gathered and the calculations were made and tabulated, but the court has made no interpretation to ascertain Judge Shaw's original intentions and expectations in view of the fact that the pending motions are moot. The material is set out for publication merely to preserve it for potential future use, all of the work having been done before mootness appeared.

Sentence Tabulation and Calculations

Case No.	Sentence (months)	Time served (months)	Percent served	Basis for release
774-71	[1] 360	72.690	20.19	In custody 6/30/78.
774-71	300	52.663	20.89	In custody 6/30/78.
567-70	[2] 180	37.742	20.97	Paroled.
774-71	[2] 144	32.942	21.12	Paroled.
382-69	144	33.600	23.33	Pardon; terminal illness.
567-70	[2] 96	22.882	23.84	Paroled.
155-67	168	56.679	33.74	Paroled.
342-67	60	21.107	35.18	Paroled.
444-68	84	33.107	39.41	Paroled.
406-66	[1] 240	99.682	41.43	Paroled.
155-67	180	77.589	43.11	Paroled.
567-70	60	26.236	43.73	Paroled.
31-62	60	27.682	46.14	Paroled.
186-64	60	28.504	47.51	Paroled.
567-70	180	92.285	51.27	In custody 6/30/78.
774-71	60	32.942	54.90	Paroled.
204-67	84	54.049	64.34	Mandatory release.
342-67	84	54.345	64.70	Paroled.
429-60	84	54.510	64.89	Mandatory release.
292-70	60	39.189	65.32	Paroled.
152-70	120	78.542	65.45	In custody 6/30/78.
18-66	120	80.548	67.12	Mandatory release.
64-68	72	49.216	68.36	Mandatory release.
382-69	144	84.822	84.76	Mandatory release.
31-62	120	120	100	Full term.
406-66	84	84	100	Full term.
155-67	96	96	100	Full term.
309-68	60	60	100	Full term.

[1] Parole eligibility under § 4208(a)(2) in original sentence.
[2] Parole eligibility under § 4208(a)(2) specified by another judge after Judge Shaw's death; in 567-70, 10-year term also reduced to 8 years.

JULY 26, 1978.

s/ VINCENT P. BIUNNO,
U.S.D.J.

273-527—78——2

United States District Court for the District of New Jersey

Civ. 76-2220 (Cr. 567-70)

UNITED STATES *v.* THOMAS J. WHELAN AND THOMAS FLAHERTY

Order

The court having been informed that defendants have both been granted parole by the U.S. Parole Commission for a date in August, 1978,

It is, on this 26th day of July, 1978,

ORDERED that the pending motions under 28 USC § 2255 be, and the same are hereby denied as moot; and it is

FURTHER ORDERED that in the event defendants not be released on parole on the scheduled date, they may apply to the court on 5 days' notice for an order to reinstate the motions.

s/ VINCENT P. BIUNNO,
U.S.D.J.

Original to Clerk.
xc: All parties.

APPENDIX B

United States District Court for the District of New Jersey

Civil 76-2220 (Cr. 567-70)

UNITED STATES
v.
THOMAS J. WHELAN AND THOMAS FLAHERTY

Addendum to Memorandum

BIUNNO, *District Judge*

This Addendum to the Memorandum dated July 16, 1978 is intended to make clear that the pending motions under 28 USC § 2255 are considered moot only in the sense that, having been granted parole, Whelan and Flaherty need no ruling from this court to be released from incarceration.

Of course, both will remain in "custody" until the expiration of their 15 year sentences in 1986, while they will be on parole supervision. They remain subject to revocation of parole in the event of a future violation, and could lose their "street time" as well as be required to serve the remainder of their sentences.

While this precludes mootness in the usual sense, the point involved is outside the scope of the present motions which are grounded on the denial of parole and continued confinement.

In order to consider the matter further in this sense, Whelan and Flaherty should be afforded a full opportunity to press the point. To make the record complete, supplements to the present motions should be served and filed, along with copies of the parole commission dispositions and briefs and any other pertinent material.

Attention is directed to the fact that none of the cases in the line from *U.S.* v. *Salerno,* 538 F. 2d 1005 (CA–3, 1976) to *U.S.* v. *Addonizio,* 573 F. 2d 147 (CA–3, 1978) deals with a situation where release on parole was granted after the filing of a § 2255 motion but before its disposition. The only reference to the subject is in this court's earlier ruling, 427 F. Supp. 379 (D.N.J., 1977), footnote 2.

It also is plain that if this aspect is to be taken up and decided at all, it should be advanced, presented and decided now, by supplement to the motions. The operative facts are known now, and it would be counter to the congressional policy expressed in 28 USC § 2255 that: "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner," to entertain new motions between now and 1986.

Both because of the novelty of the question and because the prisoners should be afforded ample time to prepare their papers, the supplements may be served and filed on or before October 10, 1978. If they find that more time is needed, leave is granted to apply *ex parte,* before that date, for an extension to another specific date.

It should be emphasized that the intention is that the matter be raised now, through the opportunity afforded, or not at all, and that any subsequent inde-

pendent motion will be regarded as falling within the congressional policy against repetitious motions for the same relief.

AUGUST 7, 1978.

s/ VINCENT P. BIUNNO,
U.S.D.J.

Original to Clerk.
xc: All counsel.

United States District Court for the
District of New Jersey

Civ. 76–2220 (Cr. 567–70)

UNITED STATES
v.
THOMAS J. WHELAN AND THOMAS FLAHERTY

Amendment to Order

For the reasons stated in the Addendum to Memorandum of even date,

It is, on this 7th day of August, 1978

ORDERED that the order herein dated July 26, 1978 be amended by adding thereto the following provisions:

"FURTHER ORDERED that the pending motions under 28 USC § 2255 may be supplemented by serving and filing the papers indicated in the Addendum to Memorandum, on or before October 10, 1978, with leave granted to apply *ex parte* before that date for an order extending the time to another specific date; and it is

"FURTHER ORDERED that should there be no supplements to the motion served and filed within the time limited or any extension thereof, any later and independently made motions will be regarded as successive motions for similar relief which the court need not consider, pursuant to 28 USC § 2255."

s/ VINCENT P. BIUNNO,
U.S.D.J.

Original to Clerk.
xc: All counsel.

APPENDIX C

United States District Court for the District of New Jersey

Criminal No. 570–70

(Civil No. 76–2220, § 2255)

UNITED STATES OF AMERICA
v.
THOMAS J. WHELAN, DEFENDANT

Order

This matter having come on for hearing under the Order dated August 17, 1978, and the Court having considered the presentations and argument of the parties through their counsel, therefore, for the reasons stated on the record of the hearing on this date.

IT IS, on this 23rd day of August, 1978, ORDERED THAT:

1. The denial of the motion by the Order dated July 26, 1978 is hereby vacated.

2. The motion to correct the sentence herein is hereby granted.

3. The sentence imposed August 10, 1971 by the late Hon. Robert Shaw, U.S. District Judge, is hereby corrected to read as follows:

> The defendant is hereby committed to the custody of the Attorney General, or his authorized representative, for imprisonment, as follows:

A. On Counts 1, 3, 4, 5, 6, 8, 9, 11, 12, 13, 14, 16, 17, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33 and 34, for a term of Ten Years;

B. On Count 2, for a term of Five Years, consecutive to the term sentence imposed under part A hereof. Execution of this Five Year term sentence is suspended, and defendant is placed on probation for a period of Five Years to follow release from parole supervision on the preceding Ten Year term;

C. Special conditions of probation, in addition to the General Conditions, are imposed as follows:

(1) Defendant shall not accept or hold any public office or position of any nature whatsoever;

(2) Defendant shall not engage in any activity, whether individually or on behalf of another, that involves dealing with any governmental or public body or agency, nor shall he accept employment by any person or entity which receives payments of or is financed by public funds in whole or in part;

(3) Defendant shall not engage in any activity, either individually or on behalf of another, which involves or is connected with gambling of any kind, whether legalized or not, and he shall not frequent any place where any such activity is carried out;

(4) Defendant shall keep and maintain complete financial records in writing, to reflect and record any and all assets and

liabilities and all transactions therein, as well as of all money and property received, disbursed or transferred, and such other financial information as may be specified by the Probation Office from time to time. Said records shall be submitted to the Probation Office for inspection on request, but not less often than twice each year, together with defendant's statement under oath that the same are true and complete;

(5) Defendant shall not travel outside the continental United States, and shall not apply for or obtain any passport, except as may be allowed by Order of the Court on terms.

4. The sentence imposed by parts B and C of ¶ 3 hereof is imposed pursuant to 18 U.S.C. § 3651.

5. Defendant shall be credited with all time served since sentence was originally imposed on August 10, 1971.

s/ VINCENT P. BIUNNO,
USDJ.

APPENDIX D

United States District Court for the District of New Jersey

Criminal No. 570–70

(Civil No. 76–2220, § 2255)

UNITED STATES OF AMERICA

v.

THOMAS FLAHERTY, DEFENDANT

Order

This matter having come on for hearing under the Order dated August 17, 1978, and the Court having considered the presentations and argument of the parties through their counsel, therefore, for the reasons stated on the record of the hearing on this date,

IT IS, on this 23rd day of August, 1978, ORDERED THAT:

1. The denial of the motion by the Order dated July 26, 1978 is hereby vacated.

2. The motion to correct the sentence herein is hereby granted.

3. The sentence imposed August 10, 1971 by the late Hon. Robert Shaw, U.S. District Judge, is hereby corrected to read as follows:

> The defendant is hereby committed to the custody of the Attorney General, or his authorized representative, for imprisonment, as follows:
>
> A. On Counts 1, 3, 4, 5, 6, 8, 9, 11, 12, 13, 14, 16, 17, 19, 21, 22, 23, 24, 25, 26, 27,

28, 29, 30, 31, 32, 33 and 34, for a term of Ten Years;

B. On Count 2, for a term of Five Years, consecutive to the term sentence imposed under part A hereof. Execution of this Five Year term sentence is suspended, and defendant is placed on probation for a period of Five Years to follow release from parole supervision on the preceding Ten Year term;

C. Special conditions of probation, in addition to the General Conditions, are imposed as follows:

(1) Defendant shall not accept or hold any public office or position of any nature whatsoever;

(2) Defendant shall not engage in any activity, whether individually or on behalf of another, that involves dealing with any governmental or public body or agency, nor shall he accept employment by any person or entity which receives payments of or is financed by public funds in whole or in part;

(3) Defendant shall not engage in any activity, either individually or on behalf of another, which involves or is connected with gambling of any kind, whether legalized or not, and he shall not frequent any place where any such activity is carried on;

(4) Defendant shall keep and maintain complete financial records in writing, to reflect and record any and all assets and liabilities and all transactions therein, as well as of all money and property received, disbursed or transferred, and such other financial information as may be specified by the Probation Office from time to time. Said records shall be submitted to the Probation Office for inspection on request, but not less

often than twice each year, together with defendant's statement under oath that the same are true and complete;

(5) Defendant shall not travel outside the continental United States, and shall not apply for or obtain any passport, except as may be allowed by Order of the Court on terms.

4. The sentence imposed by parts B and C of ¶ 3 hereof is imposed pursuant to 18 U.S.C. § 3651.

5. Defendant shall be credited with all time served since sentence was originally imposed on August 10, 1971.

s/ VINCENT P. BIUNNO,
USDJ.

U.S. GOVERNMENT PRINTING OFFICE: 1979

No. 78-156

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THOMAS J. WHELAN AND THOMAS M. FLAHERTY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SECOND SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-156

UNITED STATES OF AMERICA, PETITIONER

v.

HUGH J. ADDONIZIO

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS J. WHELAN AND THOMAS M. FLAHERTY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SECOND SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

On November 9, 1978, the Eighth Circuit, sitting en banc, decided a case that is pertinent to the question presented in our petition. The Eighth Circuit

reaffirmed its position that courts may reduce sentences in response to changes in the Parole Commission's paroling practices. It held, however, that courts have this authority only with respect to sentences imposed before November 20, 1973, under what is now 18 U.S.C. 4205(b)(2). It indicated clearly that courts could not reduce the sentences of persons sentenced—as respondents were sentenced—under what is now 18 U.S.C. 4205(a). The recent decision of the Eighth Circuit thus demonstrates that the Third Circuit stands alone in holding that sentences such as those imposed on respondents may be reduced.[1]

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[1] We had sought review in this Court of a decision by the Eighth Circuit in a related case. See *United States* v. *Edwards*, No. 78-157. The panel held in *Edwards* that a sentence imposed under 18 U.S.C. 4205(b)(1) *must* be reduced if changes in the Parole Commission's practices frustrate the sentencing court's intent, when that intent is viewed objectively. The panel in *Edwards* therefore reversed a decision in which the sentencing judge, after finding that his own intent had not been frustrated, declined to reduce a sentence. The recent en banc decision of the Eighth Circuit discards the approach of the *Edwards* panel. The en banc court has made it clear that "the subjective intent of the district court must have been thwarted by the operation and adoption of the parole guidelines" before relief may be granted (App., *infra*, 8a); consequently, the en banc court stated, "[i]f the original sentencing judge concludes that his sentencing expectations have not been thwarted, the inquiry ends at that point" (*id.* at 9a). Under this approach, the decision of the panel in *Edwards* is no longer good law in the Eighth Circuit, and accordingly we have filed a motion under Rule 60 of the Rules of this Court to dismiss our petition in that case. We continue to believe, however, that the question whether courts can reduce sentences in response to changes in parole practices is important, and we believe that the Court should resolve that question in the present cases, in which the Third Circuit has announced that district courts have substantial powers to revise sentences to achieve the defendants' release from prison at the time the court originally intended.

For this reason, and for the reasons stated in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.[2]

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1978

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[2] We initially asked the Court to grant review here and in No. 78-157. As note 1 states, No. 78-157 will be dismissed under Rule 60. If the Court concludes that it should grant review of a case in which sentence was imposed under what is now 18 U.S.C. 4205(b)(2), then it could grant the petition in *Bonanno* v. *United States*, No. 77-1665, which involves such a sentence. *Bonanno* and the present cases might be consolidated for oral argument. We believe that a single hour should be sufficient for argument in the cases if they were consolidated.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 78-1113

UNITED STATES OF AMERICA, APPELLEE

v.

BILLY EDWARD LACY, APPELLANT

No. 78-1224

UNITED STATES OF AMERICA, APPELLANT

v.

SHERRILL GARY BRINKLEY, APPELLEE

Appeals from the United States District Court
for the Eastern District of Arkansas

Submitted: June 12, 1978
Filed: November 9, 1978

Before GIBSON, Chief Judge, LAY, HEANEY, BRIGHT, ROSS and STEPHENSON, Circuit Judges, *En Banc.**

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* The Honorable J. Smith Henley, Circuit Judge, originally sentenced both Lacy and Brinkley on the present convictions. Therefore, he did not participate in deciding this appeal.

GIBSON, Chief Judge.

These cases afford us the opportunity once again to consider the availability of relief to inmates under 18 U.S.C. § 2255 when they allege that the application of parole release guidelines by the United States Parole Commission operates to thwart the intentions of the sentencing judge. We first concluded that a cause of action might be stated under § 2255 in *Kortness* v. *United States*, 514 F.2d 167 (8th Cir. 1975). Since that time, panels of this court have considered various aspects of the *Kortness* decision. The present cases both arose in the Eastern District of Arkansas. However, they were heard by different judges and the results reached were inconsistent despite nearly identical factual situations. We ordered the cases submitted *en banc* in order to ensure consistent results and to clarify the law in the circuit on this issue.

On June 20, 1973, Billy Edward Lacy was resentenced to twelve years imprisonment pursuant to 18 U.S.C. § 4208(a)(2) (1970), now § 4205(b)(2) (1976), after pleading guilty to the offense of kidnapping.[1] Following a parole hearing in September 1976, the United States Parole Commission denied Lacy parole on October 14, 1976, because he had not served the minimum time set by the guidelines based on the severity of the offense. The Commission had

[1] Initially Lacy was sentenced to a maximum term pursuant to 18 U.S.C. § 4208(b) (1970), now § 4205(c) (1976), for the purpose of evaluation.

also denied release after a hearing held a few months after Lacy's incarceration commenced. In November 1977, Lacy filed a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 and this court's decision in *Kortness* v. *United States, supra.* On December 30, 1977, Circuit Judge J. Smith Henley, sitting by designation, dismissed the request for relief.

Sherrill Gary Brinkley was placed in jail on February 13, 1973. After conviction in a jury trial on charges of aiding and abetting an attempted bank robbery and conspiracy to rob a bank, Brinkley was sentenced on June 6, 1973, to a total of twelve years imprisonment. His sentence was also pursuant to 18 U.S.C. § 4208(a)(2) (1970), now § 4205(b)(2) (1976). His conviction was ultimately affirmed in *Brinkley* v. *United States*, 560 F.2d 871 (8th Cir.), *cert. denied*, —— U.S. ——, 54 L.Ed.2d 302 (1977). Brinkley was denied parole after hearings in January 1974 and December 1976. On September 7, 1976, Brinkley filed a motion for reduction of sentence, which was treated by the District Court as a claim for relief under 28 U.S.C. § 2255 (1970) and our *Kortness* decision. After a hearing on March 10, 1978, the district court granted the relief sought and resentenced Brinkley on March 17, 1978, to the time already served. On the Government's motion, the order was stayed by the district court pending this appeal.

Lacy and Brinkley were convicted and sentenced prior to November 13, 1973. On that date, the United States Parole Board promulgated parole guidelines

that now appear in 28 C.F.R. § 2.20. The guidelines have been revised in minor respects since 1973. The goal of the guidelines apparently has been to ensure less disparate punishment of those who violate federal law. The guidelines operate by quantifying the severity of the offense as determined by the judgment of the Parole Board expressed in the guidelines and certain individual characteristics of the offender, but do not incorporate the sentencing judgment of the district court. In applying the parole guidelines, the Parole Commission does not appear to give significant weight to the sentence imposed by the district court. Of course, the sentence imposed by the district court continues to operate as the maximum term of imprisonment that the offender can be required to serve.

The difficulty with the parole guidelines when applied to individuals sentenced prior to their promulgation is that under federal law sentencing courts have been given three options in determining the sentence. If one views all of the options as being similar in providing a maximum term at which time the offender must be released from custody, the only distinction between the three variations is in the time at which the offender will be eligible for parole.

Under 18 U.S.C. § 4205(a)(1976), the offender is ineligible for release on parole until he has served one-third of his sentence or ten years of a sentence of greater than thirty years. Under 18 U.S.C. § 4205(b)(1) (1976), the sentencing judge may set a minimum term of less than one-third of the maximum sentence at which time the offender will be eligible for parole

consideration. Finally, under 18 U.S.C. § 4205(b)(2)(1976), the sentencing judge may simply fix the maximum term and permit the Parole Commission to release the offender on parole at such time as it determines. When viewed in this light, it is clear that Congress intended that sentencing judges, due to their familiarity with the offense and the offender, would be able to have some impact on the timing of consideration for parole release. The parole release guidelines adopted by the Parole Board in 1973 have effectively thwarted the role of applied mechanically to those individuals sentenced under 18 U.S.C. § 4205(b)(2)(1976), since in those cases mechanical application of the guidelines prevents significant consideration for parole by the Commission prior to the period specified in the guidelines. It is clear that Congress intended that individuals sentenced under § 4205(b)(2) would be eligible for consideration for parole at an early date, without any set waiting period, although it is also clear that the ultimate determination of whether parole was appropriate or not rested with the Parole Commission rather than the courts.

The allocation of authority and the sharing of responsibility over prison inmates between the judiciary and the executive is one of the most difficult areas of the law. The courts have a vital responsibility to protect the basic constitutional rights of prisoners. On the other hand, few would question the advisability of broad discretion in the executive in operating prisons, in caring for inmates, and in establishing rehabilitative programs, including parole. But under

the statutes now in force, Congress has recognized some role in the process for the courts, and that role must not be thwarted by subsequent wholesale changes in the Parole Commission's methods. Nor must that role defeat the discretion lawfully vested in the Parole Commission.

In *Kortness* v. *United States*, 514 F.2d 167 (8th Cir. 1975), we considered the situation of a person who had been sentenced under 18 U.S.C. § 4208(a)(2)(1970), now 18 U.S.C. § 4205(b)(2)(1976), on the same day that the parole guidelines were promulgated. We determined that under 28 U.S.C. § 2255 the district court had authority to vacate the sentence and resentence Kortness in its discretion. We reached that result by concluding that the mistaken belief of the court concerning the effect of utilizing § 4208(a)(2) could constitute a critical error under the doctrine of *United States* v. *Lewis*, 392 F.2d 440 (4th Cir. 1968). Therefore, relief under 28 U.S.C. § 2255 was appropriate.

Since our decision in *Kortness*, three circuits have specifically rejected our rationale. They have taken the view that the relief sought is actually a challenge to the action of the Parole Commission and is therefore proper only in the jurisdiction where the defendant is incarcerated and, if permissible, must be brought under 28 U.S.C. § 2241 rather than § 2255. *United States* v. *McBride*, 560 F.2d 7 (1st Cir. 1977); *United States* v. *DeRusso*, 535 F.2d 673, and 548 F.2d 372 (1st Cir. 1976); *Wright* v. *United States Board of Parole*, 557 F.2d 74 (6th Cir. 1977); *Elliott* v.

United States, 572 F.2d 238 (9th Cir. 1978); *Andrino* v. *United States Board of Parole*, 550 F.2d 519 (9th Cir. 1977). Two circuits have discussed the *Kortness* doctrine but have not yet given a clear decision as to whether it would be followed in their cases. *United States* v. *McIntosh*, 566 F.2d 949 (5th Cir. 1978); *United States* v. *Kent*, 563 F.2d 239 (5th Cir. 1977); *United States* v. *Braasch*, 542 F.2d 442 (7th Cir. 1976).

The Third Circuit has permitted relief similar to that envisioned by our *Kortness* decision. That court has emphasized that relief is permitted when the district court's sentencing expectations are frustrated by the subsequent adoption of the guidelines. In the Third Circuit's view it is the subjective intent of the sentencing judge that is crucial to relief. *United States* v. *Somers*, 552 F.2d 108 (3rd Cir. 1977); *United States* v. *Salerno*, 538 F.2d 1005, *rehearing denied*, 542 F.2d 628 (3rd Cir. 1976).

We have carefully considered the approaches taken by other circuits as well as the arguments made by the Government, the petitioners, and by the United States Parole Commission as amicus curiae. After doing so, we are still of the opinion that *Kortness* v. *United States* is conceptually sound.

It is evident from a review of the case law that has developed since *Kortness* that relief under that doctrine is limited to those sentenced prior to or on the date that parole guidelines were first promulgated, November 19, 1973. *Kills Crow* v. *United States*, 555 F.2d 183, 187 (8th Cir. 1977); *Banks* v. *United*

States, 553 F.2d 37, 39 (8th Cir. 1977); *Gravink* v. *United States*, 549 F.2d 1152 (8th Cir. 1977); *Jacobson* v. *United States*, 542 F.2d 725, 727 (8th Cir. 1976); *Fields* v. *United States*, 542 F.2d 472 (8th Cir. 1976); *United States* v. *Clinkenbeard*, 542 F.2d 59 (8th Cir. 1976). In order to be entitled to relief, an inmate must have been sentenced under 18 U.S.C. § 4208(a)(2) (1970), now 18 U.S.C. § 4205(b)(2) (1976). *Ryan* v. *United States*, 547 F.2d 426 (8th Cir. 1977); *Stead* v. *United States*, 531 F.2d 872, 875-77 (8th Cir. 1976). An inmate is not entitled to rely upon the *Kortness* doctrine until he has completed one-third of his sentence. *United States* v. *White*, 540 F.2d 409, 411 (8th Cir. 1976). Finally, the subjective intent of the district court must have been thwarted by the operation and adoption of the parole guidelines. *Gravink* v. *United States*, 549 F.2d 1152, 1153 (8th Cir. 1977). The district court has discretion to decline to vacate the sentence and resentence the defendant. *Pope* v. *Sigler*, 542 F.2d 460 (8th Cir. 1976).

Perhaps the most difficult aspect of the *Kortness* doctrine is the concept of meaningful consideration. The *Kortness* decision viewed the right to relief as depending on the district court's "mistaken belief that the defendant would receive meaningful parole consideration during his § 4208(a)(2) term, rather than be required almost automatically to serve the full term imposed, less good time allowances." 514 F.2d at 170. In *Pope* v. *Sigler*, 542 F.2d 460 (8th Cir. 1976), this court held in part that the district court

was correct in concluding that meaningful consideration had been given to the inmate's request for parole. In *Jacobson* v. *United States*, 542 F.2d 725 (8th Cir. 1976), this court noted that while the district court was entitled to expect that the defendant would receive meaningful parole consideration at the one-third point in his sentence, the facts established that the defendant had received an in-person hearing at that point in time, and thus there was no basis for resentencing. Finally, in *Banks* v. *United States*, 553 F.2d 37, 39 (8th Cir. 1977), we noted that challenges to the meaningfulness of parole considerations come under § 2241 and must be brought in the district where the defendant is incarcerated.

Our analysis of *Kortness*, the statutes, and the cases since *Kortness* convinces us that the first inquiry to be made by the district court is whether the subjective intent of the sentencing judge has been thwarted by the adoption of the parole release guidelines. In order to facilitate that inquiry, every effort should be made to refer the § 2255 petition to the judge who conducted the original sentencing. If the original sentencing judge concludes that his sentencing expectations have not been thwarted, the inquiry ends at that point. Similarly, the matter ends if the sentencing judge, after learning of the parole guidelines, finds in the course of an appropriate proceeding that he would resentence the defendant to the same punishment. *Lewis* v. *United States*, No. 78-1260, slip op. at 6 (8th Cir. Oct. 20, 1978).

On the other hand, if the sentencing judge concludes that his expectations have been thwarted, or the original sentencing judge is not available to consider the § 2255 petition, the process is more involved. In order for relief to be available under this narrow doctrine, it must be established that (1) the inmate was sentenced under § 4208(a)(2); (2) the sentence was imposed prior to or contemporaneous with the adoption of the Parole Board guidelines; (3) the prisoner has served at least one-third of his sentence; and (4) the Parole Commission has not given the required consideration to the inmate's request for parole.

Turning to the instant cases, we note that Lacy's motion under 28 U.S.C. § 2255 was considered by the judge who sentenced him. The district court concluded that Lacy had been given a hearing by the Parole Commission during the first one-third of his sentence, thus relief was unavailable under our *Kortness* decision. We have carefully considered the arguments advanced by Lacy, but have not discovered any error of law applied to these undisputed facts. We affirm this order denying relief in *Lacy*.

Brinkley's case has followed a different course. His § 2255 motion was not referred to the sentencing judge but was heard by a different member of the district court. The sentencing judge was deposed on the issue of his expectations at the time of sentencing. Our examination of the deposition and the other circumstances leaves us unclear as to whether the sentencing judge's expectations were frustrated by adop-

tion of the parole guidelines. Therefore we reverse the order granting relief to Brinkley. We are not certain that Brinkley would have been denied relief had his motion initially been referred to the sentencing judge. Since Judge Henley was the sentencing judge and is available to sit by designation and to hear the motion, we remand *Brinkley* to the District Court for referral to and consideration by Judge Henley.

The order in No. 78-1113 is affirmed.

The order in No. 78-1224 is reversed and remanded.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

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APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 77-1665 and 78-156

JOSEPH CHARLES BONANNO, JR.,
Petitioner

—*v.*—

UNITED STATES OF AMERICA

UNITED STATES OF AMERICA,
Petitioner

—*v.*—

HUGH J. ADDONIZIO

UNITED STATES OF AMERICA,
Petitioner

—*v.*—

THOMAS J. WHELAN AND THOMAS M. FLAHERTY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH AND THIRD CIRCUITS

PETITION FOR CERTIORARI IN NO. 77-1665 FILED MAY 22, 1978
PETITION FOR CERTIORARI IN NO. 78-156 FILED JULY 27, 1978
CERTIORARI GRANTED DECEMBER 11, 1978

In the Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 77-1665 and 78-156

JOSEPH CHARLES BONANNO, JR.,

Petitioner

—*v.*—

UNITED STATES OF AMERICA

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—*v.*—

HUGH J. ADDONIZIO

UNITED STATES OF AMERICA,

Petitioner

—*v.*—

THOMAS J. WHELAN AND THOMAS M. FLAHERTY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH AND THIRD CIRCUITS

INDEX

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CR. 548-69

UNITED STATES OF AMERICA

v.

HUGH J. ADDONIZIO

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
9-23-70	Sentence—10 years, fine of $25,000.00 Ordered bail continued (Barlow) (9-22-70)
9-24-70	Judgment and Commitment filed 9-23-70 (Barlow)
10-1-70	Notice of Appeal filed 9-30-70
9-22-70	Opinion of U.S.C.A. affirming U.S.D.C. filed 9-21-71
9-28-71	Order of U.S.C.A. amending opinion filed.
1-13-72	Order of U.S.C.A. amending opinion of 9-16-71 filed 1-11-72 (Vicaro, Addonizio, LaMorte and Biancone)
3-3-72	Certified copy of Order of U.S.C.A. in lieu of formal mandate affirming Judgment of U.S.D.C. filed 3-1-72
3-8-72	Copy of Judgment and Commitment with Marshal's return endorsed thereon filed 3-7-72
5-15-72	Notice of motion for reduction of sentence, for sentence under Title 18 U.S.C. 4208(a), and for correction of illegal sentence, returnable 6-5-72 filed
6-20-72	Hearing on motion for reduction of sentence; for sentence under Title 18 U.S.C. 4208(a); and for correction of illegal sentence. Order motion denied. (Barlow) (6-19-72)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 76-2048

HUGH J. ADDONIZIO

v.

UNITED STATES OF AMERICA

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
10-27-76	Notice of motion to vacate sentence imposed in Criminal 548-69, and to correct sentence to time already served filed 10-26-76
11-16-76	Hearing on motion to vacate sentence imposed in Cr. 548-69 and to correct sentence to time already served. DECISION RESERVED. (Barlow) (11-15-76)
4-28-77	Opinion filed 4-27-77. (Barlow)
	Order granting motion to vacate sentence in Cr. 548-69 imposed on 9-22-70 and resentencing him to time already served filed 4-27-77. (Barlow)
4-28-77	Order denying respondent's application for stay filed. (Barlow)
4-29-77	Hearing on government's motion for stay of order of 4-27-77. Ordered motion denied. Order to be submitted. (Barlow) (4-28-77)
4-29-77	Notice of Appeal filed 4-28-77

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No. 77-1542

HUGH J. ADDONIZIO

v.

UNITED STATES OF AMERICA

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
5-2-77	Notice of Appeal filed in D.C. April 28, 1977 received May 2, 1977, filed
5-2-77	Order (Gibbons, C.J.) dated April 28, 1977, denying appellant's application for stay of D.C. order dated April 27, 1977, without prejudice, filed.
5-2-77	Order (*Hunter* and Maris, C.J.) granting appellant's motion to return appellee to the custody of the Attorney General pending appeal and ordering Addonizio returned to the custody of the Attorney General pending determination of this appeal, filed
5-3-77	Order (Seitz, Ch. J. and Maris, Van Dusen, Aldisert, Adams, Gibbons, Rosenn, *Hunter*, Weiss and Garth, C.J.) denying appelle's motion for stay of this Court's order dated May 2, 1977, filed.
5-3-77	Petition for rehearing in banc of Court's order or May 2, 1977, filed
5-16-77	Copy of letter dated May 12, 1977 received from the Supreme Court of the United States advising they entered the following order: The application to vacate the order entered May 2, 1977, by the United States Court of Appeals for the Third Circuit, Case No. 77-1542, presented to Mr. Justice Brennan and by him referred to the Court, is granted pursuant to Sup. Ct. Rule 49(3).

DATE	PROCEEDINGS

The order filed April 27, 1977, by the United States District Court for the District of New Jersey is reinstated pending decision of the Court of Appeals of the appeal therefrom. The Chief Justice and Mr. Justice Rehnquist dissent. (S.C. No. A-917).

1-12-78 Argued. Coram: Aldisert and Hunter, Civ. and Cahn, D.J.

2-27-78 Opinion of the Court (*Aldisert* and Hunter, C.J. and Cahn, D.J.) filed

2-27-78 Judgment affirming the order of the district court filed April 27, 1977, filed

4-3-78 Order (Aldisert and Hunter, C.J. and Cahn, D.J.) (*Clerk*) amending the slip opinion filed on February 27, 1978, filed

4-25-78 Certified judgment in lieu of formal mandate issued.

TRANSCRIPT OF SEPTEMBER 22, 1970 SENTENCING PROCEEDINGS

[3] THE COURT: Mr. Stern.

MR. STERN: Your Honor, if it please the Court, the United States at this time respectfully moves the case of the United States of America v. Hugh J. Addonizio for sentencing.

THE COURT: Mr. Addonizio, step forward, please, and Mr. Hellring.

Yes, Mr. Hellring.

MR. HELLRING: May it please the Court, as this case approaches the moment of judgment, I ask for my client in the exercise of the Court's judicial discretion the minimum sentence which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant. I ask for this in the light of the most enlightened thinking on this subject in the administration of justice today and in the light of these principles I suggest to your Honor respectfully that that sentence should include no custody or confinement for my client, and I venture to suggest this to your Honor upon the basis of my client's life.

He is a man 56 years of age, born and brought up in the City of Newark, the product of a closely-knit warm, middleclass family, the product of schools in the metropolitan area, a graduate of St. Benedict's Prep and of Fordham University, in which places he early [4] distinguished himself as a leader of men, not only in the educational process but also on the gridiron, and became indeed famous throughout the state and the nation because of his exploits as a leader of young men in this area of activity.

After graduation and a period of business activity with his father, Hugh Addonizio in January of 1941 entered as a private in the United States Army. He remained continuously in the United States Army for more than five years, after which he was honorably discharged with the rank of captain. During that period of five years most of his time was spent overseas in actual battle combat. He risked his life for his nation on almost

a daily basis, and by reason thereof received hosts of awards, including the Bronze Star, and is one of the few men in this nation to hold eight campaign medals for his combat campaigns in the north of Africa, in Europe under General Patton, in England and in virtually all of the campaigns in which this country was engaged in the Second World War.

Immediately after leaving the Army in 1946 and a short return to his business life, he entered into politics and two years later he was elected to the United States Congress from a district which included the suburban area of the Oranges, suburban Newark, and [5] approximately two-fifths of the City of Newark, and he served in this district with great and unblemished distinction for fourteen years. His representation of his people in Congress was distinguished not so much by his record as a member of the Committee on Banking and Curency and as a member of the Committee on Housing, but by the untold daily things that he did for the people in his district who knew him and who loved him because he was ready at any time to be of help and stressed the needs of the poor and the underprivileged in the help in which he gave, and stressed the needs of the poor and underprivileged in the interests in which he followed in his days in Congress.

When he left the Congress in 1962, after fourteen years, to run for Mayor of the City of Newark, he did so at a time when Newark was at a standstill, the largest urban center of our state, part of the greatest metropolitan area of our nation, a city which for decades had been subjected to the aura of corruption and impropriety, as is true of most of our urban centers and has been true of them for so many decades, a city which was standing still. For eight years he served as the mayor of that city. His eight years were eight years of great forward movement in the City of Newark for the people. These eight years were years when Newark opened its arms, [6] opened her arms to the poor and underprivileged, not only the black, but of every minority group, a melting pot which is in the greatest and highest tradition of our nation, and in that way followed all of the dictates and precepts which had been learned over the years by my client.

During his period as mayor, my client saw to the development of the Meadowlands Project, a project which had stood still for decades and been planned but nothing had happened until he became mayor. The commencement of the largest commercial renewal project in the history of New Jersey is now in progress as the result of the commencement of that project during my client's administration. It was my client whose administration brought into being the middle-income housing legislation, after fighting for its adoption. It was finally passed in the 1968-69 term. For decades Routes 78 and 280 had been planned, without any action, and these were finally agreed upon and cleared as the result of the day-and-night efforts of my client. There is today in progress a 100-million-dollar improvement program at Newark Airport, which is almost singlehanded the result of the efforts of my client, who recognized the terrible condition in which our airline industry in the East found itself, and at great political risk undertook the [7] necessary negotiations for years that resulted in the present project.

There is at present being constructed in the City of Newark the New Jersey College of Medicine and Dentistry. It would not be under construction there today were it not for my client, nor would the improvements and the growth of the Essex County Community College and the expansion of Rutgers and the Newark College of Engineering.

One of the reasons why my client left Congress and decided to run for Mayor of the City of Newark was because of his experience in bringing to the urban communities much-needed programs for urban benefits, and so it happened the City of Newark went to the forefront in this area. The Newark Model Cities Program became considered by the Department of Housing and Urban Development as a model for the nation, and the Financial Aid Program, the Federal Financial Aid Program was first and foremost in the City of Newark. Newark's Public Housing Program became the largest in the nation on a per-capita basis. Even the projects which were the subject matter of the litigation before your

Honor, the South Side Interceptor Sewer and the Southerly Extension were projects of enormous imagination, one of which, at least, had been under consideration for a long time without any action, [8] and they were brought into existence in my client's administration, and at the time they were brought into existence, received the greatest praise for the activity which resulted in bringing them into being.

At the end of that 27 years of public life I suppose that my client in the last mayoralty election in Newark received the highest kind of recommendation that can be brought before a tribunal. When I asked myself after the verdict of the jury what kind of recommendations can I bring to the Court about my client, it seemed to me and it seems to me now that when a man, after two years of public calumny in the press, culminating in an indictment which is tried during an election, with the daily bombardment which is necessitated under those circumstances, when a man stands before his peers, before the jury, which decided on election day, and he gets 45% of their votes, then I think that is more recommendation than I can suggest in any other way to your Honor.

I recognize that at this time your Honor must assume the guilt of my client. The presumption of innocence is gone. The jury has found him guilty, but I would respectfully suggest to your Honor that even so, it is appropriate and proper for your Honor to take into consideration not only the verdict of the jury, not only the gravity of the offense, but also the nature and [9] the quantity and the quality of the evidence which was adduced against my client, and I respectfully suggest to your Honor that all of that evidence, with the exception of the testimony of one man, was hearsay, which would not have been admissible were this not a conspiracy case, and that as to the testimony of that one man, it was the testimony of a man who is unworthy, a man whose record, when placed against the record of my client, who contradicted his testimony, remains unworthy.

I ask for your Honor's discretion. I ask justice for my client. Thank you.

THE COURT: Thank you, Mr. Hellring.

Do you have anything, Mr. Addonizio, that you wish to say in your own behalf before I pronounce sentence upon you?

MR. ADDONIZIO: Thank you, your Honor, but I believe that my attorney has covered the matter.

THE COURT: Mr. Addonizio and Mr. Hellring, I am mindful, of course, of Mr. Addonizio's past accomplishments and of his honorable service in World War II, that he was elected seven times to the Congress of the United States, that he was elected to two successive four-year terms as the Mayor of Newark. I am also aware of the many honors and awards, both military and civil, which were conferred upon him during these years, and I [10] recognize that in many instances he served his country and he served his constituency well.

Weighed against these virtues, however, Mr. Hellring, is his conviction by a jury in this court of crimes of monumental proportion, the enormity of which can scarcely be exaggerated and the commission of which create the gravest implications for our form of government.

Mr. Addonizio, and the other defendants here, have been convicted of one count of conspiring to extort and 63 substantive counts of extorting hundreds of thousands of dollars from persons doing business with the City of Newark. An intricate conspiracy of this magnitude, I suggest to you, Mr. Hellring, could have never succeeded without the then-Mayor Addonizio's approval and participation.

These were no ordinary criminal acts. These crimes were not the product of a moment of weakness, nor were they inspired by any of the defendant's desperate financial circumstances, nor were they the result of some emotional compulsion. These crimes for which Mr. Addonizio and the other defendants have been convicted represent a pattern of continuous, highly-organized systematic criminal extortion over a period of many years, claiming many victims and touching many more lives. [11] Instances of corruption on the part of elected and appointed governmental officials are certainly not novel to the law, but the corruption disclosed here, it seems to the Court, is compounded by the frightening alliance of

criminal elements and public officials, and it is this very kind of totally destructive conspiracy that was conceived, organized and executed by these defendants.

The criminal acts of these defendants were as calculated as they were brazen, as callous and contemptuous of the law as they were extensive. Nor can these defendants' criminal conduct be measured in dollars alone. It is impossible to estimate the impact upon—and the cost of—these criminal acts to the decent citizens of Newark, and, indeed, to the citizens of the State of New Jersey, in terms of their frustration, despair and disillusionment. How can we calculate the cynicism engendered in our citizens, including our youngsters, by these men? How does one measure the erosion of confidence in our system of government and the diminished respect for our laws occasioned by these men? These very men—or some of them—who, as governmental officials, inveighed against crime in the streets, while they pursued their own criminal activities in the corridors of City Hall.

[12] Their crimes, in the judgment of this Court, tear at the very heart of our civilized form of government and of our society. The people will not tolerate such conduct at any level of government, and those who use their public office to betray the public trust in this manner can expect from the courts only the gravest consequences.

Although the jury here—and quite properly—found the defendants guilty of one count of conspiracy and of 63 counts of extortion, each separate crimes, all committed in furtherance of that conspiracy, for the purposes of sentencing I regard these acts as representing a single continuing pattern of criminal activity, and therefore I will not sentence the defendants or any of them on each count for which they were convicted, but on the total indictment itself.

It is, accordingly, the sentence of this Court that the defendant Hugh J. Addonizio shall be committed to the custody of the Attorney General of the United States for a term of ten years, and that, additionally, the defendant Hugh J. Addonizio shall pay a fine of $25,000. That is all.

[SEAL] January 24, 1977

UNITED STATES DEPARTMENT OF JUSTICE
UNITED STATES PAROLE COMMISSION

Washington, D.C. 20537

NOTICE OF ACTION

Name—Hugh J. Addonizio

Register Number—75033-158

Institution—Lewisburg

In the case of the above-named the following action with regard to parole, parole status, or mandatory release was ordered:

Continue for Regular Review Hearing in December 1977.

(Reasons for continuance or revocation)
(Conditions or remarks)

Your offense behavior has been rated as very high severity. Your salient factor score is 11. You have been in custody a total of 57 months at time of hearing. Guidelines established by the Commission for adult cases which consider the above factors suggest a range of 26-36 months to be served before release for cases with good institutional adjustment. After careful consideration of all relevant factors and information presented, a decision above the guidelines appears warranted because your offense was part of an ongoing criminal conspiracy lasting from 1965 to 1968, which consisted of many separate offenses committed by you and approximately 14 other co-conspirators.

As the highest elected official in the City of Newark, you were convicted of an extortion conspiracy in which, under color of your official authority, you and your co-conspirators conspired to delay, impede, obstruct, and otherwise thwart construction in the City of Newark in order to obtain a percentage of contracts for the privilege of working on city construction projects.

Because of the magnitude of this crime (money extorted totalling approximately $241,000), its economic effect on innocent citizens of Newark, and because the offense in-

volved a serious breach of public trust over a substantial period of time, a decision above the guidelines is warranted. Parole at this time would depreciate the seriousness of the offense and promote disrespect for the law.

Appeals procedure: You have a right to appeal a decision as shown below. Filing the appeal is your responsibility which others cannot perform for you. Forms for that purpose may be obtained from your caseworker, or the Regional Office of the Commission, and must be filed with the Commission within thirty days of the date this Notice was sent.

A. *Decision of a Hearing Examiner Panel.* Appeal may be made to the Regional Commissioner.

B. *Decision of the National Commissioners when referred to them for reconsideration.* Appeal may be made to the Regional Commissioner.

C. *Decision of the Regional Commissioner.* Appeal may be made to the National Appeals Board.

D. *Decision of National Commissioners in cases where they assumed original jurisdiction.* Appeal may be made to the entire Commission.

E. *Decision of a Regional Commissioner relative to Parole condition or continuance under supervision.* Appeal may be made to the National Appeals Board.

Copies of this notice are sent to your institution and/or your probation officer. In certain cases copies may also be sent to the sentencing court. You are responsible for advising any others to whom you might wish to make information on this form available.

January 13, 1977
(Date Notice sent)

National Commissioners
(Region) (NAB) (Nat. Dir.)

NFB
(Docket Clerk)

INMATE COPY

[SEAL] July 11, 1975

UNITED STATES DEPARTMENT OF JUSTICE
UNITED STATES PAROLE COMMISSION

Washington, D.C. 20537

NOTICE OF ACTION

Name—Hugh J. Addonizio

Register Number—75033-158

Institution—Lewisburg

In the case of the above-named, the Board has carefully examined all the information at its disposal and the following action with regard to parole, parole status, or mandatory release was ordered:

Continue for Institutional Review Hearing in January 1977.

Reasons for denial, continuance or revocation:
(Use separate sheet if necessary)

Conditions or remarks: REASONS: Your offense behavior has been rated as very high severity. You have a salient factor score of 11. You have been in custody a total of 39 months. Guidelines established by the Board for adult cases which consider the above factors indicate a range of 26-36 months to be served before release for cases with good institutional program performance and adjustment. After careful consideration of all relevant factors and information presented, it is found that a decision outside the guidelines at this consideration appears warranted because the offense was part of a large scale or organized criminal conspiracy. Further, the offense behavior consisted of multiple separate offenses.

Appeals procedure: You have a right to appeal a decision as shown below. Forms for that purpose may be obtained from your caseworker, and must be filed with the Chief,

Classification and Parole, (or his equivalent) within thirty days of the date this Notice was sent.

A. *Decision of a Hearing Examiner Panel.* Appeal may be made to the Regional Director.

B. *Decision of the National Appellate Board referred to it for reconsideration.* Appeal may be made to the Regional Director.

C. *Decision of the Regional Director.* Appeal may be made to the National Appellate Board.

D. *Decision of Regional Directors in cases where they assumed original jurisdiction.* Appeal may be made to the National Appellate Board.

/s/ [Illegible]

July 8, 1975
(Date Notice sent)

(Region—Specify)

NFB
(Docket Clerk)

National Appellate Board—XXX
(Check)

INMATE COPY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Cr. 548-69

UNITED STATES OF AMERICA

vs.

HUGH J. ADDONIZIO, DEFENDANT.

NOTICE OF MOTION PURSUANT TO TITLE 28 U.S.C. 2255 TO VACATE AND SET ASIDE SENTENCE AND TO CORRECT SENTENCE TO TIME ALREADY SERVED

TO: HONORABLE JONATHAN L. GOLDSTEIN
United States Attorney for the
District of New Jersey
Federal Square
970 Broad Street
Newark, New Jersey 07101

SIR:

PLEASE TAKE NOTICE, that at 10:00 in the forenoon on Monday, November 15, 1976, or as soon thereafter as counsel may be heard, the undersigned attorneys for defendant, Hugh J. Addonizio, shall move before the Honorable George H. Barlow at the United States Court House, Trenton, New Jersey, for an order pursuant to Title 28, U.S.C. § 2255 vacating and setting aside the ten-year sentence imposed upon defendant Hugh J. Addonizio in September 1970 and correcting the sentence so that the same shall be for the period of time already served.

PLEASE TAKE FURTHER NOTICE, that counsel shall rely upon the Memorandum submitted herewith.

HELLRING, LINDEMAN, LANDAU
& SIEGAL
Attorneys for Defendant,
HUGH J. ADDONIZIO

By: /s/ Michael Edelson
MICHAEL EDELSON
A Member of the Firm

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Cr. 548-69

UNITED STATES OF AMERICA,

vs.

HUGH J. ADDONIZIO, ET AL, DEFENDANTS.

AFFIDAVIT OF HUGH J. ADDONIZIO

STATE OF PENNSYLVANIA)
) ss.:
COUNTY OF)

HUGH J. ADDONIZIO, of full age, being duly sworn according to law upon his oath, deposes and says:

1. I am the defendant in the within case and make this affidavit in support of the motion brought on my behalf before Your Honor pursuant to Title 18 U.S.C. § 2255 for vacation of my sentence and correction to time already served.

2. The motion was argued before Your Honor on November 15, 1976. At the time of the argument of the motion Your Honor was advised that my initial parole application had been denied, that all appeals to the Parole Commission affirmed the denial of parole, and that the Parole Commission had set January 1977 as the date when I would be eligible for my next institutional hearing. A copy of a letter dated March 1, 1976 from Joseph Nardoza, Regional Director of the United States Board of Parole to my counsel advising that my case was continued for an institutional review hearing in January 1977 is attached hereto as Exhibit "A".

3. The institutional review hearing, in fact, took place on December 8, 1976. At that time I was simply advised by the two hearing officers that they had no authority to grant my application for parole since I am designated a "central monitoring" case. I have recently

received official notice of the action taken on December 8, which notice is dated December 23, 1976, and states: "Designated as original jurisdiction and referred to National Commissioners for decision." A copy of that notice is attached to this affidavit as Exhibit "B".

4. Exhibits attached to the memorandum originally submitted by my counsel in support of the motion argued on November 15, 1976 show that the Parole Commission advised me of this new "central monitoring" designation at approximately the same time the Honorable R. Dickson Herman ordered removal from my file of the previous "special offender" designation.

5. I believe that the action taken on December 8, 1976 by the hearing officers means that I will not be released for at least approximately four months even in the event that the National Commissioners rule favorably on my application once the same comes to them for review.

6. In a letter dated April 27, 1976 to my counsel, which was attached as Exhibit 6 to the original memorandum in support of the motion returnable November 15, 1976, I explained my understanding that the new classification of "central monitoring" meant that despite the fact that I am now at the Farm Dorm and technically classified minimum security, I nevertheless do not have the privileges which would ordinarily be available to one with my institutional record and a classification of minimum security. The privileges which are not afforded to me include the right to social furloughs.

7. In addition, I think Your Honor should be aware that there was a further change in my rights and privileges which occurred the week of November 15, 1976, immediately after my motion under Title 18 U.S.C. § 2255 was argued. Up until that time inmates at the Farm Dorm, where I am incarcerated, were allowed visitors seven days a week. While visitation continues on a seven day per week schedule at all other facilities of the Lewisburg Penitentiary, visitation for inmates at the Farm Dorm has now been restricted to weekends only unless special permission for a weekday visit has been granted two weeks in advance of the visit and then only if a guard is present to cover.

8. After now having spent almost five years in prison, having (I am informed) an excellent institutional behavior record, having been finally transferred from the main prison facility (medium security) to the Farm Dorm and technically classified minimum security; I am, nevertheless, in the position of having the privileges ordinarily afforded to minimum security prisoners denied to me and, in fact, am more restricted in regard to the right to receive visitors than minimum security inmates since I am allowed visitors only two days a week while medium security inmates are allowed visitors seven days a week.

9. I am making this affidavit at this time so that Your Honor will be aware of the events which have transpired since the argument of my motion on November 15, 1976, and upon the belief that those events provide additional reasons for the granting of my motion.

/s/ Hugh J. Addonizio
HUGH J. ADDONIZIO

Sworn to and subscribed before
me this 6 day of January, 1977.

/s/ [ILLEGIBLE]
Parole Officer—Authorized by
Act of July 7, 1955, to administer oaths (18 U.S.C. 40041)

EXHIBIT A

UNITED STATES DEPARTMENT OF JUSTICE
UNITED STATES BOARD OF PAROLE
Scott Plaza II
Sixth Floor
Industrial Highway
Philadelphia, Pennsylvania 19113

March 1, 1976

Michael Edelson, Esq.
HELLRING, LINDEMAN & LANDAU
Counsellors at Law
1180 Raymond Boulevard
Newark, New Jersey 07102

Re: Hugh J. Addonizio
Reg. No. 75033-158

Dear Mr. Edelson:

Please be advised that pursuant to your request, the U. S. Board of Parole, after careful and thorough review, have voted to make no change in the July 8, 1975 order continuing Mr. Addonizio's case for an institutional review hearing in January 1977.

Since this case was reopened by me under authority of the Code of Federal Regulations, Sections 2.17 and 2.28, no Notice of Action is being forwarded to Mr. Addonizio. However, he has been advised of the final decision by a telephone call on February 24, 1976 to the Lewisburg penitentiary.

I am taking the liberty of sending a copy of this letter to Mrs. Addonizio at her residence and to Mr. Addonizio at the institution.

Sincerely,

/s/ Joseph A. Nardoza
JOSEPH NARDOZA
Regional Director

EXHIBIT B

[SEAL] December 23, 1976

UNITED STATES DEPARTMENT OF JUSTICE
UNITED STATES PAROLE COMMISSION
Washington, D.C. 20537

Notice of Action

Name—Hugh J. Addonizio

Register Number 75033-158

Institution—Lewisburg

In the case of the above-named the following action with regard to parole, parole status, or mandatory release was ordered.

DESIGNATED AS ORIGINAL JURISDICTION AND REFERRED TO NATIONAL COMMISSIONERS FOR DECISION.

(Reasons for continuance or revocation)
(Conditions or remarks)

REASONS: Pursuant to CFR 2.17 your offense behavior was part of a large scale criminal conspiracy or a continuing criminal enterprise.

Appeals procedure: You have a right to appeal a decision as shown below. Filing the appeal is your responsibility which others cannot perform for you. Forms for that purpose may be obtained from your caseworker, or the Regional Office of the Commission, and must be filed with the Commission within thirty days of the date this Notice was sent.

A. *Decision of a Hearing Examiner Panel.* Appeal may be made to the Regional Commissioner.

B. *Decision of the National Commissioners when referred to them for reconsideration.* Appeal may be made to the Regional Commissioner.

C. *Decision of the Regional Commissioner.* Appeal may be made to the National Appeals Board.

D. *Decision of National Commissioners in cases where they assumed original jurisdiction.* Appeal may be made to the entire Commission.

E. *Decision of a Regional Commissioner relative to Parole condition or continuance under supervision.* Appeal may be made to the National Appeals Board.

Copies of this notice are sent to your institution and/or your probation officer. In certain cases copies may also be sent to the sentencing court. You are responsible for advising any others to whom you might wish to make information on this form available.

Dec. 22, 1976
(Date Notice sent)

Northeast
(Region) (NAB) (Nat. Dir.)

mlc
(Docket Clerk)

INMATE COPY

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Cr. 548-69

UNITED STATES OF AMERICA,

vs.

HUGH J. ADDONIZIO, ET AL, DEFENDANTS.

AFFIDAVIT OF HUGH J. ADDONIZIO

STATE OF PENNSYLVANIA)
) ss.:
COUNTY OF)

HUGH J. ADDONIZIO, of full age, being duly sworn according to law upon his oath, deposes and says:

1. I am making this affidavit in support of my motion pending before Your Honor for a vacation of my sentence and correction to time already served, and to supplement my affidavit dated January 6, 1977, which I understand has been filed with Your Honor.

2. I had my institutional review hearing for parole on December 8, 1976. When I walked into the hearing room, the hearing examiner said to me:

> "We don't really have any questions for you—with you it's not a question of rehabilitation, it is only a question of how long they want you to stay here."

(While the preceding is not a direct quotation, it is my best recollection and accurately sets forth the meaning of what I was told.)

4. The usual emergency furlough (serious illness or death in the family) at the Farm Dorm where I am incarcerated is for five or six days with no prison personnel as an escort. This summer when my mother, who has been seriously ill for some time, took a drastic turn for the worse, I was finally granted permission for an emergency furlough. The conditions imposed upon me, however, were that the furlough had to take a total of no

more than twelve hours, including travelling time (approximately six hours), that I had to be accompanied by a prison escort, and that I had to bear the expense both of the trip for the escort and myself and also of the overtime salary for the escort. I am informed that this was the very first time that conditions such as the ones which were imposed upon me were imposed upon any inmate from the Farm Dorm who was given a furlough. I was also told at the time that the furlough was granted that it probably meant I would not get any additional furlough within a short period of time no matter what the circumstances. In other words, I was told that if my mother died I would not be given an additional furlough to attend the funeral.

5. I would like the Court also to be aware of the fact that Gordon Liddy of Watergate fame has just received a transfer to Allenwood (the nicest facility at Lewisburg) even though Mr. Liddy is not eligible for parole until 1981. I have been attempting to get a transfer to Allenwood since I first came to Lewisburg without success.

/s/ Hugh J. Addonizio
HUGH J. ADDONIZIO

Sworn to and subscribed before me
this 8th day of January, 1977.

/s/ [ILLEGIBLE]

Parole Officer—Authorized by
Act of July 1955, to administer
oaths (18 U.S.C. 40041)

UNITED STATES DISTRICT COURT
FOR THE MIDDLE OF PENNSYLVANIA

UNITED STATES OF AMERICA, EX REL

HUGH J. ADDONIZIO, No. 75033-158, PETITIONER,

vs.

FLOYD E. ARNOLD, Warden of the Federal Penitentiary at Lewisburg, Pennsylvania, RESPONDENT.

PETITION FOR WRIT OF HABEAS CORPUS
AND PETITION FOR WRIT OF MANDAMUS

TO THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA:

FIRST COUNT

Your petitioner respectfully shows:

1. I am incarcerated at the Federal Penitentiary in Lewisburg.

2. My sentence was imposed by the United States District Court for the District of New Jersey, Trenton, New Jersey, by the Honorable George Barlow.

3. The docket number of the case was Cr. No. 548-69. The indictment bears no number.

4. Sentence was imposed on September 22, 1970 of commitment to the custody of the Attorney General of the United States for ten years and payment of a fine of $25,000.00.

5. A finding of guilty was made after a plea of not guilty.

6. The finding of guilty was made by a jury.

7. Appeal was taken from the judgment of conviction.

8. (a) The appeal was taken to the United States Court of Appeals for the Third Circuit. Petition was then filed for a rehearing by the Third Circuit Court of Appeals en banc. Petition for Certiorari was then filed in the United States Supreme Court and a Petition for Rehearing subsequently was filed.

(b) The United States Court of Appeals for the Third Circuit affirmed the judgment below on September 16, 1971, and denied the Petition for Rehearing on November 9, 1971. The United States Supreme Court denied the Petition for Certiorari on February 22, 1972, and denied the Petition for Rehearing on April 3, 1972. The citation to the opinion of the Court of Appeals for the Third Circuit is 451 F. 2d 49 (1972). The citation for the denial for the Petition for Certiorari is 405 U.S. 936, 30 L.Ed. 812, 92 Sup. Ct. 949. The citation for the denial of the application of rehearing for Petition of Certiorari is 405 U.S. 1048, 31 L.Ed.2d 591, 92 Sup. Ct. 1309.

9. The following are the grounds upon which I base my allegation that I am being held in custody unlawfully:

Based upon the decisions of *Catalano* v. *United States*, 383 F. Supp. 346 (D.Conn. 1974) and the opinion of this Court by the Honorable William J. Nealon, Jr. of July 7, 1975, in the case of Raia v. Floyd E. Arnold, Warden United States Penitentiary at Lewisburg, Pennsylvania, I have been denied due process of law under the Due Process Clause of the Fifth Amendment of the United States Constitution by virtue of the fact that I have been classified a "special offender" without prior notice of the classification, without reasons for the classification having been furnished to me and without a hearing as required by the Catalano and Raia opinions having been held.

10. The facts upon which the above grounds are based are as follows:

I learned of the special offender designation on my file when I first made application for transfer from the main facility at Lewisburg to the Farm Dorm or Allenwood, the minimum security facilities at Lewisburg. I was advised then that while my record at the prison to the point of making the application, my background and the other facts which would have generally been considered on such an application were all favorable, that I could not be transferred to a minimum security facility

because I was designated a special offender. During my period of incarceration both of my daughters were married and prior to each marriage I made application for a social furlough to attend the weddings. On each such occasion, permission for a social furlough was denied and I was again advised that the special offender classification was the reason for the denial. From time to time other inmates with longer sentences than mine were granted privileges to leave the prison walls for certain occasions but I was denied similar privileges, again because of the special offender designation.

On July 3, 1975, I first became eligible for parole having served a full one-third of my sentence. I was advised by my case worker and work supervisor that my prison record was an excellent one. I was also aware that I had served more time than required under the Parole Board's guidelines for the offense of which I was convicted and also that I had the highest possible score on the salient factor quotient. All of this was confirmed to me by the two members of the Parole Board who conducted my parole hearing at Lewisburg on June 2, 1975. Nevertheless, the members of the Parole Board conducting the hearing at Lewisburg indicated that because of the special offender designation on my file that they would decline to rule on my application and would forward the application for consideration to the Regional office in Philadelphia. I was then informed that the Regional office in Philadelphia had forwarded the matter to the National Board in Washington. Despite the fact that I had the highest possible score on the salient factor quotient and despite the fact I had already served more time than the Parole Board's guidelines would require in the ordinary case, the three members of the National Board denied my application on July 8, 1975 and set a new date for parole eligibility of January 1977.

I have been informed that the disposition of the three members of the National Board may be appealed by me to the full Board and that a hearing on the appeal will be had on July 30, 1975.

11. I have not previously filed a Petition for Habeas Corpus nor have I made a motion pursuant to Title 28

Section 2255 of the United States Code. The motions as described in the next paragraph were filed on my behalf. In addition, requests for administrative relief were filed by me also as set forth in the next paragraph.

12. (a) A motion pursuant to Rule 35 of the Federal Rules of Criminal Procedures was filed with the United States District Court for the District of New Jersey on May 15, 1972 for reduction of sentence, for sentence under Title 18 U.S.C. Section 4208(a), and for correction of illegal sentence. The challenge to the legality of the sentence involved the monetary fine of $25,000 which was imposed as part of a general sentence where maximum monetary fine permitted for a violation of Title 18 U.S.C. Section 1951 is $10,000. That motion was denied on June 5, 1972.

(b) A further motion was filed with the United States District Court for the District of New Jersey on September 14, 1973, for revision of my sentence pursuant to Title 18 U.S.C. Section 4208(a) to designate a minimum term at the expiration of which I would be eligible for parole. At the time of oral argument on that motion, my counsel also requested that the Court require removal of the special offender designation from my file. That motion was denied on April 4, 1974. In regard to the request for removal of the special offender designation, Judge Barlow in a letter to me stated that he had no jurisdiction to modify administrative determinations of the Bureau of Prisons.

(c) On November 8, 1974, I filed a request for removal of the "special offender" designation on my file directed to the Warden of Lewisburg on Form DIR-9. I received a response denying the request dated November 13, 1974.

(d) On November 15, 1974, I filed an appeal from the denial of my request for administrative remedy to the Director, Bureau of Prisons, on Form DIR-10. The appeal was denied by response dated December 30, 1974.

(e) On January 2, 1975, I filed an appeal to the Assistant Director, General Counsel and Review, on Form DIR-11. That appeal was denied by response dated February 4, 1975. Copies of Forms DIR-9, 10 and 11 are at-

tached hereto as Exhibits "A", "B", and "C", respectively.

13. I believe my remedy by way of motion under Title 28 Section 2255 of the United States Code is inadequate to test the legality of my detention since it is my understanding that a motion brought under that section must be addressed to the question of the validity of the imposition of the original sentence or the underlying conviction and not to a violation of due process rights occurring subsequent to the imposition of sentence.

14. I was represented by an attorney throughout every stage of the court proceedings leading to my conviction and incarceration.

15. The name and address of the law firm which represented me is Hellring, Lindeman & Landau, 1180 Raymond Boulevard, Newark, New Jersey.

WHEREFORE, petitioner respectfully prays that upon this application I be brought before this Court and this Court require production of my file being maintained by respondent at the United States Penitentiary at Lewisburg, Pennsylvania.

Petitioner further prays that upon his application a writ of habeas corpus be issued for the purpose of inquiring into the detention and restraint of petitioner and upon hearing and determination the special offender designation on your petitioner's file be found to be a violation of my constitutional right to due process under the Fifth Amendment and, accordingly, that my detention, as a result of the denial of my application for parole based upon the special offender designation, be found unlawful and that your petitioner be released from the custody of respondent.

SECOND COUNT

1. By this Second Count of this petition, your petitioner seeks the extraordinary relief by writ of mandamus pursuant to Title 28 U.S.C. Section 1361, requiring that the "special offender" designation on my file be removed and not be used in any manner or form by the

Bureau of Prisons or the Board of Parole until such time as a hearing is conducted and the due process procedures as set forth in the case of *Catalano* v. *United States*, 383 F. Supp. 346 (D. Conn. 1974) and the opinion of this Court in *Raia* v. *F. E. Arnold* are complied with by respondent.

2. Your petitioner repeats the statements set forth in Paragraphs 1 through 15 of the First Count of this petition with the same force and effect as if set forth herein at length.

3. Based upon the authority cited in this petition and in the memorandum of law submitted by counsel in support of this petition, I believe that my due process rights under the Fifth Amendment of the Constitution of the United States have been violated by the action of the Bureau of Prisons in classifying me a special offender without a hearing and without following the procedures outlined in the cited cases.

4. The special offender designation on my file has in fact, resulted in a denial to me of various privileges at the Federal Penitentiary in Lewisburg for which I would have been eligible but for the special offender designation.

5. The special offender designation on my file in addition resulted in a delay of a determination on my application for parole and I truly believe that it was the basis for the action of the three members of the National Board in denying the application.

6. I further believe that without an order of this Court requiring removal of the special offender designation from my file that the same will be considered on the appeal of my parole application to the full Board which I am informed will be heard on July 30, 1975.

WHEREFORE, your petitioner prays that the respondent be ordered to remove all "special offender" classification notations from all of my records and files in the Bureau of Prisons and that the "special offender" designation not be used in any manner or form by the Bureau or the Board of parole until and unless the respondent holds a hearing which fully conforms to the due process procedures set forth in *Catalano* v. *United States*, *supra*,

and *Raia* v. *F. E. Arnold;* and more particularly that an order issue to the National Parole Board that the "special offender" designation on petitioner's file may not be considered by it in any way or manner in its deliberations at the hearing on your petitioner's appeal from the denial of my application for parole by the three members of the Parole Board.

Respectfully submitted,

MICHAEL EDELSON, ESQUIRE
HELLRING, LINDEMAN & LANDAU
1180 Raymond Boulevard
Newark, New Jersey 07102

By: /s/ Louise O. Knight
LOUISE O. KNIGHT
CLEMENT & KNIGHT
113 Market Street
Lewisburg, Pa. 17837

EXHIBIT A

FEDERAL BUREAU OF PRISONS
REQUEST FOR ADMINISTRATIVE REMEDY

To: ——— Warden of Institution
——— Director, Bureau of Prisons

From: ADDONIZIO, HUGH J.
75033-158-G
Lewisburg, Pa.

Part A—INMATE REQUEST

On numerous occasions I have requested to be transferred to the 'farm and/or Allenwood'. I have been told that due to the "S.O." classification that this institution has me classified under, that any transfer is impossible.

Why am I classified as a "S.O." offender, and with my clear and excellent institutional record, *why* can't I be transferred as requested.

I request that the "S.O." classification be rescinded as unfounded and that I immediately be reviewed for transfer to the above cited facilities, or written reason be supplied me in regard to any denial.

Date—November 9th., 1974

/s/ Hugh J. Addonizio
HUGH J. ADDONIZIO

Part B—RESPONSE

The term "S.O." (Special Offender) is used as a method to keep track of inmate movement within the Bureau of Prisons for various reasons, i.e. separate from codefendants, publicity reasons, etc. Your offense was certainly bestowed with great publicity and notoriety. This is not a bar necessarily from minimum custody or transfer to a farm. You were denied custody and LFC because you

have too much time remaining on your sentence at this time.

Date—11-13-74

/s/ W. M. Kennedy, Chief, CM
W. M. KENNEDY, CHIEF, CM
Department Head or
Representative

/s/ G. I. Canster, AWIP
G. I. CANSTER, AWIP
Warden, Director, or
Associate

SECOND COPY: To be returned to the offender after completion.

Return to:

I acknowledge receipt this date of a complaint from the above inmate in regard to the following subject:

#127

Requirement for submission of this request directly to the Director, Bureau of Prisons.

When the offender feels that he may be adversely affected by submission of this request at the institution level because of the sensitive nature of the complaint, he may address his complaint to the Director through the Prisoners' Mail Box. He must clearly indicate a valid reason for not initially bringing his complaint to the attention of the institution staff.

If the offender does not provide a reason, or if the Direc-or his designee feels that the reason supplied is not adequate, the complaint will be returned to the offender for processing at the institution level.

EXHIBIT B

PMB
Nov. 25, 1974

FEDERAL BUREAU OF PRISONS
APPEAL
RESPONSE FOR ADMINISTRATIVE
REMEDY REQUEST

To: Director, Bureau of Prisons

From: ADDONIZIO, HUGH J.
75033-158
Lewisburg, Pa.

*Part A—REASON FOR APPEAL:

The response on DIR 9 is *inadequate* and is in violation of recent court decisions.

See: *Catalano* vs. *U.S.*, 16 CrL 2096; *Masello* vs. *Norton*, 364 F. Supp. 1133.

There is no reason why with my institutional record that I could not be transferred to the farm and/or Allenwood, as I can name many residents that have been transferred to either facility with more time left remaining on their sentence than I have, and who are just as, or more publicized than my case has been, including the 'Water-gate' members, who I'm sure you must agree had their share of headlines. I am also going before the Parole Board in a few months.

I request that the S.O. designation be immediately removed from my record, and that I immediately be reconsidered for transfer to the 'farm or Allenwood'.

If the response to this appeal is not adequate, I will have my retained counsel seek immediate court relief, with reference to the above cited cases, and the continued prejudice shown to just 'certain residents' of this institution.

Date—November 15th., 1974

/s/ Hugh J. Addonizio
HUGH J. ADDONIZIO

* The Completed Form No. BP-DIR-9 Must Accompany This Appeal.

Part B—RESPONSE

Your designation as a special offender has been carefully reviewed. The official records investigation reflect that you were a known associate of persons who were connected with organized criminal activity, and therefore your designation as a special offender is appropriate under the guidelines of Policy Statement 7900.47, para. 5(2).

Custody classifications are the responsibility of each institution. Factors that the institution consider include length of sentence, which in your case is 10 years and parole eligibility. Your classification as a medium custody inmate does not appear to have been an arbitrary decision. Absent a showing of arbitrariness, I will not mandate a change in custody. You can be assured however that the institution will continually monitor your custody and classification and will make changes when appropriated.

Date—12-30-74

/s/ E. O. Toft
E. O. TOFT

ORIGINAL: To be returned to offender after completion.

EXHIBIT C

PMB
Jan. 8, 1975

FEDERAL BUREAU OF PRISONS
CENTRAL OFFICE APPEAL
RESPONSE FOR ADMINISTRATIVE
REMEDY REQUEST

To: Assistant Director, General Counsel and Review

From: ADDONIZIO, HUGH J.
75033-158
Lewisburg, Pa.

* Part A—REASON FOR APPEAL:

The responses on DIR 9 & 10 are inadequate and misdirected. I indeed agree that the designation of classification is the responsibility of each institution. The point in this appeal, so far disregarded is not can I be classified as a 'special offender' but rather the manner in which this classification was accomplished in direct violation of the cases cited in my DIR 10. I was not afforded any notice and/or hearing prior to this classification and this is a violation of my due process rights. Unless this order is rescinded and my record corrected that deleates the 'special offender' status I will immediately have my retained counsel seek the appropriate court relief. My argument is not that you can or cannot classify me as a 'special offender', but in the illegal manner that it was done. I also remind you, that mere association is not proof of any guilt, as stated and decided by *Nassif* vs. *United States*, 370 F.2d 147, 153.

Date—Jan. 2nd., 1975

/s/ Hugh J. Addonizio
HUGH J. ADDONIZIO

* The Completed Forms No. BP-DIR-9 and BP-DIR-10 Must Accompany This Appeal.

Part B—RESPONSE

We have reviewed your appeal regarding the issue of your classification as a Special Offender and your claim that you were denied due process prior to this classification. On the merits, we find that a reasonable basis exists for the determination that you are properly classified as a Special Offender pursuant to Policy Statement 7900.47 (4-30-74). Your offense clearly involved sophisticated criminal activity of an organized nature, and you associated with individuals involved in organized criminal activity. Further, yours was a case of great notoriety. Your complaint with respect to the procedures employed is apparently based upon several decisions by the United States District Court for the District of Connecticut. The procedures set forth by that Court are the subject of an appeal to the Court of Appeals for the 2nd Circuit. Inasmuch as these decisions do not control in the Middle District of Pennsylvania and the matter is yet to be resolved, we are adhering to general Bureau policy throughout the system. Thus, at present there is no requirement for notification to the inmate nor for a hearing under the Administrative Remedy Procedure. Accordingly, we affirm the response by the Warden and by the Regional Director in your case.

Date—February 4, 1975

/s/ Eugene N. Barkin
EUGENE N. BARKIN
Assistant Director, General
Counsel and Reviewer

ORIGINAL: To Be Returned to Offender After Completion.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No.

HUGH J. ADDONIZIO, PLAINTIFF,

vs.

FLOYD E. ARNOLD, Warden of Federal Penitentiary at Lewisburg, DEFENDANT.

AFFIDAVIT IN SUPPORT OF
PETITION FOR HABEAS CORPUS

STATE OF PENNSYLVANIA)
) ss.:
COUNTY OF)

HUGH J. ADDONIZIO, of full age, being duly sworn according to law upon his oath, deposes and says:

1. I am presently an inmate at the Farm Dorm facility of Lewisburg Federal Penitentiary. I was just transferred to the Farm Dorm from the main facility at Lewisburg on 1975.

2. On March 6, 1972, I surrendered myself to the U.S. Marshall in Newark, New Jersey, to begin serving a ten year sentence imposed by the United States District Court for the District of New Jersey, following my conviction under Title 18 U.S.C. § 1951.

3. I was first taken to the Federal Penitentiary in Atlanta, Georgia, and remained there a little over a month before transfer to Lewisburg. I have now served forty months of my sentence and first became eligible for parole on July 3 of this year.

4. During my incarceration at the main facility, I had made several requests for transfer to the minimum security facilities at the Farm Dorm or Allenwood. When I first made such an application, my case worker told me that transfer to a minimum security facility was impos-

sible because I was classified as a "special offender". This was despite the fact that my prison record and the other factors generally considered on applications for transfer to minimum security facilities would have indicated that my application should have been granted.

5. During my period of incarceration, both of my daughters have been married and prior to the marriage of each, I made application for a social furlough to attend the weddings. Both of these applications were denied and I was again advised that the reason was my "special offender" designation. Other privileges, such as the opportunity to attend various events outside the prison walls, were also denied to me because of my special offender status.

6. I had been given no prior notice that I had been classified a "special offender" and have not been given to this date any specific reason for the classification.

7. On June 2, 1975, I had a parole hearing before two members of the Parole Board at Lewisburg. At that time, what I had been previously told by my case worker and by my work supervisor at the prison was confirmed; that my record at the prison had been an excellent one and that all reports from the prison concerning my conduct and attitude had been highly favorable.

8. The two members of the Parole Board who were at Lewisburg for the hearing further confirmed to me that I had the highest possible score on the salient factor quotient (which I understand to be the Parole Board rating system for granting of parole) and that I had further already served more time than is set forth in the Parole Board's guidelines for the offense of which I was convicted.

9. Nevertheless, apparently because of the special offender designation on my file, the two members who conducted the hearing at Lewisburg declined to rule on my application and referred the matter to the regional office of the Parole Board in Philadelphia.

10. I was then advised that the Regional Board in Philadelphia further declined to make a ruling on my application and the same was sent to the National Board in Washington. On July 8, 1975, three members of the

National Board in Washington denied my application for parole and set January 1, 1977 as the next date upon which I could file an application for parole.

11. I have now been advised that the special offender designation on my file makes the salient factor quotient and the Parole Board's own guidelines on parole inapplicable in my case and, accordingly, constitutes a basis for my application having been denied.

12. All other facts set forth in the associated Petition for Writ of Habeas Corpus and Petition for Writ of Mandamus are true and correct to the best of my knowledge, information and belief.

13. I submit this affidavit in support of the petition for habeas corpus being filed on my behalf on the grounds that the special offender designation on my file violates the Due Process Clause of the Fifth Amendment.

/s/ Hugh J. Addonizio
HUGH J. ADDONIZIO

Sworn to and subscribed before me
this 14th day of July, 1975.

/s/ [ILLEGIBLE]

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 75-856

[Filed May 3, 1976]

UNITED STATES OF AMERICA, ex rel.
HUGH J. ADDONIZIO, PETITIONER

v.

FLOYD E. ARNOLD, Warden, Federal Penitentiary,
Lewisburg, Pennsylvania, RESPONDENT

ORDER

AND NOW, this 3d day of May 1976, IT IS ORDERED that the respondent remove all "special offender" notations from petitioner's records and files in the Bureau of Prisons.

IT IS FURTHER ORDERED that respondent refrain from redesignating petitioner a "special offender" until such time as he is afforded a hearing on conformance with the due process procedures set forth in RAIA v. ARNOLD, Civil No. 75-25 (M.D. Pa., filed July 7, 1975).

In all other respects the petition is denied.

BY THE COURT

/s/ R. Dixon Herman
R. DIXON HERMAN
United States District Judge

February 3, 1976

Joseph Nardoza, Regional Director
United States Board of Parole
Northeast Region
Scott Plaza II, Sixth Floor
Industrial Highway
Tinicum Township
Philadelphia, Pennsylvania 69113

Re: *Hugh J. Addonizio*

Dear Mr. Nardoza:

We represent Hugh J. Addonizio who is presently an inmate at the Farm Dorm of the Lewisburg Federal Penitentiary. Mr. Addonizio surrendered to the custody of the United States Marshal to begin serving his ten-year sentence on March 6, 1972. He first became eligible for parole in early July 1975. His application was denied and a new date for hearing was set for January 1977. Mr. Addonizio's appeals to three members of the National Board in Washington and then to the full National Board in Dallas in October 1975 were denied, and the new date for his eligibility, January 1977, was affirmed.

Eligibile at the same time for parole was Anthony LaMorte, a co-defendant in the same case as Mr. Addonizio. Mr. LaMorte's parole application followed the same course as Mr. Addonizio's except that the full Board in Dallas changed Mr. LaMorte's next hearing date from January 1977 to April 1976.

We have seen an article in the *Newark Star Ledger* of Tuesday, January 27, 1976, which announces that the United States Board of Parole has granted Mr. LaMorte parole effective April 5, 1976. The article indicates that the ruling was the result of the cause having been reopened by you as Regional Director. The article further recites that another co-defendant of Mr. Addonizio, Joseph Biancone, had previously been granted parole effective March 10, 1976.

I called your office on January 29 to see whether I could ascertain on what basis the cases of Mr. LaMorte and Mr. Biancone were apparently reopened by your office, without similar consideration having been given to Mr. Addonizio. I was advised that Mr. LaMorte's file was in California, that you were out of the office, and that nobody in the office had any information as to why Mr. LaMorte's case had been reopened.

At the time of Mr. Addonizio's original parole hearing before the two hearing officers in Lewisburg, during the time his appeal was pending in Washington, and at the appeal before the National Board in Dallas, it was confirmed to me that Mr. Addonizio's prison record was exemplary, that he had earned all the good time credits he possibly could, that his salient factor quotient score was the highest attainable, and that he had already served more time than the parole board's own guidelines required. When the three members of the National Board in Washington denied Mr. Addonizio's parole application, we were originally told that his right to appeal before the Full Board could be heard at the Full Board's meeting which was scheduled prior to the October meeting. We were then subsequently told that Mr. Addonizio's appeal would not be considered until October. One of the principal reasons for the delay until the October meeting, we were told, was that Mr. LaMorte's appeal had not been timely filed for hearing at the meeting prior to October and that since Mr. LaMorte and Mr. Addonizio were co-defendants, the parole board intended to keep them on the same hearing schedule.

I spoke with Mr. Newman of your office on Wednesday, January 28. He was unable to tell me why Mr. LaMorte's case had been reopened by your office without similar consideration having been afforded to Mr. Addonizio. He was further unable to advise me of what procedure is followed by your office in reaching a decision to reopen a case. Mr. Newman suggested that I communicate with you concerning my inquiries. When I called your office again on January 29, I was advised that you do not speak to attorneys.

In view of the time already served by Mr. Addonizio, his outstanding record while in prison, and now the granting of parole to two co-defendants who had received the same sentence as Mr. Addonizio; we believe, at a minimum, Mr. Addonizio's case is entitled to the same consideration given to Mr. LaMorte's case. We would appreciate being advised of the criteria used by you in reopening the LaMorte case and as to why those same criteria are not equally applicable to the Addonizio case.

Very truly yours,

ME:dl

UNITED STATES DEPARTMENT OF JUSTICE
UNITED STATES BOARD OF PAROLE

Scott Plaza II
Sixth Floor
Industrial Highway
Philadelphia, Pennsylvania 19113

March 1, 1976

Michael Edelson, Esq.
HELLRING, LINDEMAN & LANDAU
Counsellors at Law
1180 Raymond Boulevard
Newark, New Jersey 07102

Re: Hugh J. Addonizio
Reg. No. 75033-158

Dear Mr. Edelson:

Please be advised that pursuant to your request, the U.S. Board of Parole, after careful and thorough review, have voted to make no change in the July 8, 1975 order continuing Mr. Addonizio's case for an institutional review hearing in January 1977.

Since this case was reopened by me under authority of the Code of Federal Regulations, Sections 2.17 and 2.28, no Notice of Action is being forwarded to Mr. Addonizio. However, he has been advised of the final decision by a telephone call on February 24, 1976 to the Lewisburg penitentiary.

I am taking the liberty of sending a copy of this letter to Mrs. Addonizio at her residence and to Mr. Addonizio at the institution.

Sincerely,

/s/ Joseph Nardoza
JOSEPH NARDOZA
Regional Director

[SEAL]

U.S. PENITENTIARY
LEWISBURG, PA.

DATE: 4-26-76

TO : Addonizio, Hugh Reg. No. 75033-158 FD

FROM : W. M. Kennedy, Chief, Case Management
RBJ

SUBJECT : Designation as Central Monitoring Case

In accordance with Bureau of Prisons Policy Statement 7900.53, you have been tentatively designated as a Central Monitoring Case for the reason indicated below. The purpose of this designation is to monitor and control the transfer and community participation of those inmates who pose special management problems, by maintaining in our Central Office in Washington a record of these inmates, known as "Central Monitoring Cases". These cases require prior Central Office approval for such transfers or community activities. This centralized monitoring is not for the purpose of precluding transfers or participation in community activities for those who are otherwise eligible, but to provide coordination and consistency.

A check appears next to the reason for your tentative designation.

A. [ ] Offenders who require protection because they may be in serious danger if confined in the same facility with certain other offenders or in certain geographical areas are considered Central Monitoring Cases. Likewise, the offenders from whom such protection cases are to be separated are also designated as Central Monitoring Cases in order to maintain the separation.

B. Offenders who by reason of their office, criminal record, institutional behavior, or notoriety require especially close supervision are designated as Central Monitoring Cases.

B-1 [ ] Extremely dangerous offenders whose escape attempts or other disruptive activities have been or would likely be of significant danger to others;

B-2 [ ] Offenders who have made threats to high government officials;

B-3 [✓] Offenders who have received unusual publicity because of the nature of the crime, arrest, trial, prisoner status, or record of involvement in criminal activity of a sophisticated nature or whose presence in the community or in minimum security institutions might depreciate the seriousness of the offense or promote disrespect for the law.

B-4 [ ] Other offenders who require close supervision for their own or others' protection.

C. [ ] All offenders at USP, Lewisburg serving state commitments under contract with the non-federal authority are considered Central Monitoring Cases.

Other pertinent information (where applicable) ———

You have the opportunity to respond or object to this designation. You may respond orally or in writing to the Chief, Case Management or Case Management Coordinator within a period of thirty days of this date.

cc: Central File
C.M.C. File

Tuesday
April 27, 1976

Dear Mike,

Enclosed is the latest memorandum which I have received from the institution. I am sending it on to you for whatever action you think is necessary. I believe Policy Statement 7900.53 is a new policy statement that came out a few weeks ago. I have not read it but from what I can gather from around here it has to do with furloughs. It seems they are going to have two (2) classifications now, here at the Farm Dormitory. One (1) will be minimum and the other will be minimum community. As you can judge from the enclosed I will not be considered for furlough so evidently I will still be classified minimum but designated as a Central Monitoring Case and therefore ineligible. I think this is important enough to bring to the attention of the Judge handling my matter as it again shows, that being designated a special offender, deprives you from having the same privileges that others have here, some of whom may sleep right next to you. It shows very strongly in my judgment, the double standard of justice that they have here at this institution and why it is important for the Judge to take some action. I know Louise Knight has written to him but I think it's important to follow up with this as he may not be aware of it. Please let me know what happens.

Hoping that this note finds you and your family in the best of health and that you will convey my best to Bernie also. Rest assured too, that I appreciate all you have done and I will always be grateful.

Sincerely,

/s/ Hugh

TO : Addonizio, Hugh Reg. No. 75033-158

/s/ W. M. Kennedy

FROM : W. M. Kennedy, Chief, Case Management

SUBJECT : Designation as Central Monitoring Case

You were recently given a form indicating that you were tentatively being designated a Central Monitoring Case. We have received additional clarification to the effect that a more specific reason should be set forth. Therefore, the attached form supercedes the one originally sent to you and that copy should be destroyed.

DATE: 5-7-76

TO : Addonizio, Hugh Reg. No. 75033-158

/s/ W. M. Kennedy

FROM : W. M. Kennedy, Chief, Case Management

SUBJECT : Designation as Central Monitoring Case

In accordance with Bureau of Prisons Policy Statement 7900.53, you have been tentatively designated as a Central Monitoring Case for the reason indicated below. The purpose of this designation is to monitor and control the transfer and community participation of those inmates who pose special management problems, by maintaining in our Central Office in Washington a record of these inmates, known as "Central Monitoring Cases". These cases require prior Central Office approval for such transfers or community activities. This centralized monitoring is not for the purpose of precluding transfers or participation in community activities for those who are otherwise eligible, but to provide coordination and consistency.

You have the opportunity to respond or object to this designation. You may respond orally or in writing to the Chief, Case Management or Case Management Coordinator within a period of thirty days of this date.

A check appears next to the reason for your tentative designation with the specifics noted in the "comment" section.

A. [ ] Offenders who require protection because they may be in serious danger if confined in the same facility with certain other offenders or in certain geographical areas are considered Central Monitoring Cases. Likewise, the offenders from whom such protection cases are to be separated are also designated as Central Monitoring Cases in order to maintain the separation.

B. Offenders who by reason of their offense, criminal record, institutional behavior, or notoriety require especially close supervision are designated as Central Monitoring Cases.

B-1 [ ] Extremely dangerous offenders whose escape attempts or other disruptive activities have been or would likely be of significant danger to others;

B-2 [ ] Offenders who have made threats to high government officials;

B-3 [✓] Offenders who have received unusual publicity because of the nature of the crime, arrest, trial, prisoner status, or record of involvement in criminal activity of a sophisticated nature or whose presence in the community or in minimum security institutions might depreciate the seriousness of the offense or promote disrespect for the law.

B-4 [ ] Other offenders who require close supervision for their own or others' protection.

C. [ ] All offenders at USP, Lewisburg serving state commitments under contract with the non-federal authority are considered Central Monitoring Cases.

Comments: Your past positions as a U.S. Congressman and the Mayor of Newark, NJ plus the publicity you received as a result of the multiple extortion charges while you were mayor. The offense was extremely sophisticated and represented a large scale criminal conspiracy as well as a violation of the public trust while a city official.

June 21, 1976

Joseph Nardoza, Regional Director
United States Board of Parole
Northeast Region
Scott Plaza II, 6th Floor
Industrial Highway
Tinicum Township
Philadelphia, Pennsylvania 10113

Re: *Hugh J. Addonizio*

Dear Mr. Nardoza:

We last wrote to you as counsel for Hugh J. Addonizio on February 3, 1976 requesting at that time a reexamination of Mr. Addonizio's parole file because of the reopening of the cases and granting of parole to two co-defendants who had received the same sentence as Mr. Addonizio.

The file was reviewed and we received notice from you dated March 1, 1976 that the United States Board of Parole had voted to make no change in the June 8, 1975 order continuing Mr. Addonizio's case for an institutional review hearing in January 1977.

Since that date the following events have occurred which we believe justify a reexamination of Mr. Addonizio's file and the granting to him of parole:

1. On May 3, 1976 the Honorable R. Dixon Herman, United States District Court Judge for the Middle District of Pennsylvania, ordered the "special offender" designation removed from Mr. Addonizio's file. That designation had been on the file during all prior considerations of Mr. Addonizio's applications for parole. A copy of Judge Herman's Order is enclosed.

2. The new Parole Commission and Reorganization Act signed by President Ford on March 15, 1976 became effective as of May 15, 1976. That act, and particularly Sections 4206 and 4207, establish criteria,

procedures, and guidelines on information to be considered by the Parole Board which were not in existence at the time Mr. Addonizio's applications were before the Board.

Mr. Addonizio's prison record remains exemplary. He has now served fifty-one months in prison while the guidelines for the crime of which he was convicted call for institutionalization of twenty-six to thirty-six months. He was first eligible for parole over eleven months ago. His salient quotient factor remains the highest obtainable.

It is now several months since the release of the two co-defendants, Joseph Biancone and Anthony La Morte. The only publicity, of which I am aware, resulting from their release were articles sympathetic to Mr. Addonizio comparing the treatment accorded him with that accorded Biancone and La Morte; particularly since Biancone was widely reported in the press to have been an "associate of New Jersey underworld leader Ruggiero A. (Tony Boy) Boiardo, Jr." It should also be noted that Mr. Boiardo, who was an original co-defendant in the case, was severed in the middle of the trial and has never been brought to final judgment. Four elected officials of the City of Newark (councilmen) had also been indicted as co-defendants. They were severed at the beginning of the trial because of the unavailability of their attorney, and have, like Mr. Boiardo, never been brought to trial. In the meantime, Mr. Addonizio remains in jail.

We submit with all due respect that Mr. Addonizio has been more than punished. Release at this time could not deprecate the seriousness of the crime. When measured against the punishment of his original co-defendants, there is no sense, no justice, and no reason in requiring Mr. Addonizio to remain behind bars.

The Honorable George H. Barlow, United States District Court Judge for the District of New Jersey (the sentencing judge) stated in a letter to Mr. Addonizio that he (Judge Barlow) had requested Mr. Norman A. Carlson, Director of the Bureau of Prisons, to review

Mr. Addonizio's special offender classification since "on the basis of the facts known to me, it didn't appear that you [Mr. Addonizio] represented a threat to a particular inmate, the institution, or the community." That letter was written on April 4, 1974; two years and two months ago.

The new Parole Act mandates consideration by the Parole Board of the views of the sentencing judge. It is fair to say that in fixing a sentence the sentencing judge assumes that the Parole Board will follow its own and legislative guidelines with the result that the man sentenced will be freed on parole in accordance with those guidelines provided he has a good prison record. The only ground ever suggested for the denial of Mr. Addonzio's parole was in regard to the original publicity attendant to his trial and conviction. As a result of that same publicity, Mr. Addonizio was denied until very recently "minimum custody" status and was required to remain at a medium security facility. Even today he is denied many privileges, including the right to furlough. I am also enclosing for your consideration two letters from the Addonizio family physician, Dr. William H. Di Giacomo, the first dated July 15, 1975 and the second dated March 30, 1976; both of which have not received any positive response.

Based upon all of the foregoing, we respectfully request both your consideration and that of the Board of Parole.

Very truly yours,

ME/ny
encls.

[SEAL]

UNITED STATES DEPARTMENT OF JUSTICE
UNITED STATES BOARD OF PAROLE

Scott Bldg. Scott Plaza II
Industrial Highway, Tinicum Township
Philadelphia, Pennsylvania 19113

July 1, 1976

Mr. Michael Edelson, Esq.
Hellring, Lindeman, Landau & Siegal
Counsellors at Law
1180 Raymond Boulevard
Newark, N.J. 07102

Re: ADDONIZIO, Hugh J.
Reg. No. 75033-158

Dear Mr. Edelson:

This acknowledges your letter of June 21, 1976 in which you requested us to reexamine Mr. Addonizio's parole file and consider the reopening of this case.

Please be assured that the Commission has considered carefully the information in your letter, but has determined that no favorable action be taken at this time. The Notice of Action dated July 8, 1975 continuing Mr. Addonizio for an institutional review hearing in January, 1977 remains in effect. Your letter is being placed in the file to retain a record of your comments and recommendations.

Sincerely yours,

/s/ Joseph A. Nardoza
JOSEPH A. NARDOZA
Regional Commissioner

JCR/kk

[SEAL]

[SEAL]

UNITED STATES DEPARTMENT OF JUSTICE
UNITED STATES BOARD OF PAROLE

Washington, D.C. 20537
October 29, 1975

Mr. Michael Edelson
Attorney at Law
1180 Raymond Boulevard
Newark, New Jersey 07102

Re: Hugh J. Addonizio
Reg. No. 75033-158

Dear Mr. Edelson:

This is to confirm our telephone call to your office on October 16, 1975.

The U.S. Board of Parole, meeting in Dallas, Texas, on October 15, 1975, affirmed the previous decision dated July 8, 1975. This means that Mr. Addonizio has been continued for a further institutional review hearing in January 1977.

Sincerely yours,

/s/ Daniel J. Capodanno
DANIEL J. CAPODANNO
Analyst
National Appellate Board

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 76-2220

THOMAS J. WHELAN AND THOMAS M. FLAHERTY

v.

UNITED STATES OF AMERICA

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
11-29-76	Motion to vacate sentences imposed in Cr. 570-70 filed 11-22-76
1-12-77	Hearing on motion to vacate sentences imposed in Cr. 570-70.
3-14-77	Order denying motion to vacate sentences imposed in Cr. 570-70 filed 3-11-77 (Biunno).
5-25-78	Order on mandate that the judgment entered March 14, 1978 is vacated and set aside; and cause remanded for reconsideration filed 5-24-78.
7-31-78	Order denying motion to vacate sentence imposed in Cr. 570-70 filed 7-28-78 (Biunno).
8-11-78	Amendment to order of 7-26-78 filed 8-9-78 (Biunno).
8-28-78	Order of July 26, 1978 denying defendants' motion to vacate sentences vacated; motions to correct sentences granted (Biunno).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No. 77-1621

THOMAS J. WHELAN AND THOMAS M. FLAHERTY

v.

UNITED STATES OF AMERICA

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1-12-78	Argued, Coram; Aldisert and Hunter, C.J. and Cahn, D.J.
2-27-78	Judgment vacating the judgment of the district court (filed March 11, 1977) and remanding the cause for reconsideration, filed.

[SEAL]

UNITED STATES DEPARTMENT OF JUSTICE
UNITED STATES BOARD OF PAROLE

Washington, D.C. 20537

Notice of Action

Name—Thomas Flaherty

Register Number—73404-158

Institution—Lewisburg

In the case of the above-named the following action with regard to parole, parole status, or mandatory release was ordered:

Your case has been designated as Original Jurisdiction and referred to the National Commissioners for decision

(Reasons for continuance or revocation)
(Conditions or remarks)

Pursuant to CFR Section 2.17—The offense involved an Unusual degree of planning and was part of a large-scale continuing criminal conspiracy and you have received national or unusual attention because of the nature of the crime, arrest, trial and because of the community status.

Appeals procedure: You have a right to appeal a decision as shown below. Filing the appeal is your responsibility which others cannot perform for you. Forms for that purpose may be obtained from your caseworker, and must be filed with the Board within thirty days of the date this Notice was sent.

A. *Decision of a Hearing Examiner Panel.* Appeal may be made to the Regional Director.

B. *Decision of the National Directors when referred to them for reconsideration.* Appeal may be made to the Regional Director.

C. *Decision of the Regional Director.* Appeal may be made to the National Appellate Board.

D. *Decision of National Directors in cases where they assumed original jurisdiction.* Appeal may be made to the entire Board.

Copies of this notice are sent to your institution and your probation officer. In certain cases copies may also be sent to the sentencing court. You are responsible for advising any others to whom you might wish to make information on this form available.

June 11, 1976
(Date Notice sent)

Northeast
(Region)
(NAB)
(Nat. Dir)

mg
(Docket Clerk)

BOARD FILE COPY

[SEAL]

UNITED STATES DEPARTMENT OF JUSTICE
UNITED STATES BOARD OF PAROLE

Washington, D.C. 20537

NOTICE OF ACTION

Name—Thomas Flaherty

Register Number—73404-158

Institution—Lewisburg

In the case of the above-named the following action with regard to parole, parole status, or mandatory release was ordered:

Continue for Statutory Review Hearing in June 1978.

(Reasons for continuance or revocation)
(Conditions or remarks)

Your offense behavior has been rated as very high severity. You have a salient factor score of 11. You have been in custody a total of 59 months. Guidelines established by the Commission for adult cases which consider the above factors indicate a range of 26-36 months to be served before release for cases with good institutional program performance and adjustment. After review of all relevant factors and information presented, a decision above the guidelines at this consideration appears warranted because your offense was part of a large scale, organized criminal conspiracy and an ongoing criminal enterprise, according to Presentence Investigation dated July 30, 1971. In addition the offense committed involved a violation of public trust. Commission policy prohibits a continuance in your case of more than 24 months without review. Your next review has been scheduled in accordance with this statute.

Appeals procedure: You have a right to appeal a decision as shown below. Filing the appeal is your re-

sponsibility which others cannot perform for you. Forms for that purpose may be obtained from your caseworker, and must be filed with the Board within thirty days of the date this Notice was sent.

A. *Decision of a Hearing Examiner Panel.* Appeal may be made to the Regional Director.

B. *Decision of the National Directors when referred to them for reconsideration.* Appeal may be made to the Regional Director.

C. *Decision of the Regional Director.* Appeal may be made to the National Appellate Board.

D. *Decision of National Directors in cases where they assume original jurisdiction.* Appeal may be made to the entire Board.

Copies of this notice are sent to your institution and your probation officer. In certain cases copies may also be sent to the sentencing court. You are responsible for advising any others to whom you might wish to make information on this form available.

July 7, 1976
(Date Notice sent)

National Commissioners
(Region)
(NAB)
(Nat. Dir)

(Docket Clerk)

BOARD FILE COPY

[SEAL]

UNITED STATES DEPARTMENT OF JUSTICE
UNITED STATES PAROLE COMMISSION

Washington, D.C. 20537

NOTICE OF ACTION ON APPEAL

Name—Thomas M. Flaherty

Register Number—73404-158

Institution—Lewisburg

REGIONAL APPEAL: The appeal by the above-named has been carefully examined by the Regional Director(s) and the following was ordered:

——— Affirmation of the previous decision.

——— Reversal or modification of the previous decision, as follows:

——— An institutional hearing during the month of _____

——— A regional appellate hearing before the Regional Director.

You have a right to appeal this order to the National Appeals Board. Forms for that purpose may be obtained from your caseworker, and must be filed with the Chief, Classification and Parole (or his equivalent), within 30 days of the date shown below. All appeals (Regional and National) must be sent to the Regional Office for processing.

NATIONAL APPEAL: The appeal by the above-named has been carefully examined by the National Appeals Board and the following was ordered:

a) No other information submitted for requested review was deemed significant enough to affect the decision.

XXX Affirmation of the previous decision.

b) Reasons given support the decision.

——— Reversal or modification of the previous decision as follows:

——— An institutional hearing during the month of _____

——— A rehearing at the regional appellate level.

——— A hearing before the entire Commission (applicable only in cases where the Regional Directors assumed original jurisdiction).

All decisions by the National Appeals Board on appeals are final.

October 19, 1976
(Date Notice sent)

_____
(Region-specify)

NFE
(Docket Clerk)

National Appeals Board
XXX
(Check)

COMMISSION COPY—REGIONAL OFFICE

[SEAL]

UNITED STATES DEPARTMENT OF JUSTICE
UNITED STATES BOARD OF PAROLE

Washington, D.C. 20537

NOTICE OF ACTION

Name—Thomas Whelan

Register Number—73405-158

Institution—Lewisburg

In the case of the above-named the following action with regard to parole, parole status, or mandatory release was ordered:

Your case has been designated as Original Jurisdiction and referred to the National Commissioners for decision.

(Reasons for continuance or revocation)
(Conditions or remarks)

Per CFR, Section 2.17, the offense involved an unusual degree of planning and was part of a large-scale continuing criminal conspiracy and you received national and unusual attention because of the nature of the crime, the arrest and the trial.

Appeals procedure: You have a right to appeal a decision as shown below. Filing the appeal is your responsibility which others cannot perform for you. Forms for that purpose may be obtained from your caseworker, and must be filed with the Board within thirty days of the date this Notice was sent.

A. *Decision of a Hearing Examiner Panel.* Appeal may be made to the Regional Director.

B. *Decision of the National Directors when referred to them for reconsideration.* Appeal may be made to the Regional Director.

C. *Decision of the Regional Director.* Appeal may be made to the National Appellate Board.

D. *Decision of National Directors in cases where they assumed original jurisdiction.* Appeal may be made to the entire Board.

Copies of this notice are sent to your institution and your probation officer. In certain cases copies may also be sent to the sentencing court. You are responsible for advising any others to whom you might wish to make information on this form available.

June 11, 1976
(Date Notice sent)

Northeast
(Region)
(NAB)
(Nat. Dir)

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(Docket Clerk)

BOARD FILE COPY

[SEAL]

UNITED STATES DEPARTMENT OF JUSTICE
UNITED STATES BOARD OF PAROLE

Washington, D.C. 20537

NOTICE OF ACTION

Name—Thomas Whelan

Register Number—73405-158

Institution—Lewisburg

In the case of the above-named the following action with regard to parole, parole status, or mandatory release was ordered:

Continue for Statutory Review Hearing in June 1978.

(Reasons for continuance or revocation)
(Conditions or remarks)

Your offense has been rated as very high severity. You have a salient factor score of 11. You have been in custody a total of 59 months. Guidelines established by the Commission for adult cases which consider the above factors indicate a range of 26-36 months to be served before release for cases with good institutional program performance and adjustment. After review of all relevant factors and information presented, a decision above the guidelines at this consideration appears warranted because your offense was part of a large scale, organized criminal enterprise, in accordance with Presentence Investigation dated July 30, 1971. In addition, the offense committed was a violation of public trust. Commission policy prohibits a continuance in your case of more than 24 months without review. Your next review has been scheduled in accordance with this statute.

Appeals procedure: You have a right to appeal a decision as shown below. Filing the appeal is your responsibility which others cannot perform for you. Forms for that purpose may be obtained from your caseworker, and must be filed with the Board within thirty days of the date this Notice was sent.

A. *Decision of a Hearing Examiner Panel.* Appeal may be made to the Regional Director.

B. *Decision of the National Directors when referred to them for reconsideration.* Appeal may be made to the Regional Director.

C. *Decision of the Regional Director.* Appeal may be made to the National Appellate Board.

D. *Decision of National Directors in cases where they assumed original jurisdiction.* Appeal may be made to the entire Board.

Copies of this notice are sent to your institution and your probation officer. In certain cases copies may also be sent to the sentencing court. You are responsible for advising any others to whom you might wish to make information on this form available.

July 7, 1976
(Date Notice sent)

National Commissioners
(Region)
(NAB)
(Nat. Dir)

(Docket Clerk)

BOARD FILE COPY

[SEAL]

UNITED STATES DEPARTMENT OF JUSTICE
UNITED STATES PAROLE COMMISSION

Washington, D.C. 20537

NOTICE OF ACTION ON APPEAL

Name—Thomas Whelan

Register Number—73405-158

Institution—Lewisburg

REGIONAL APPEAL: The appeal by the above-named has been carefully examined by the Regional Director(s) and the following was ordered:

——— Affirmation of the previous decision.

——— Reversal or modification of the previous decision, as follows:

——— An institutional hearing during the month of _____

——— A regional appellate hearing before the Regional Director.

You have a right to appeal this order to the National Appeals Board. Forms for that purpose may be obtained from your caseworker, and must be filed with the Chief, Classification and Parole (or his equivalent), within 30 days of the date shown below. All appeals (Regional and National) must be sent to the Regional Office for processing.

NATIONAL APPEAL: The appeal by the above-named has been carefully examined by the National Appeals Board and the following was ordered:

a) No other information submitted for requested review was deemed significant enough to affect the decision.

XXX Affirmation of the previous decision.

b) Reasons given support the decision.

——— Reversal or modification of the previous decision as follows:

——— An institutional hearing during the month of _____

——— A rehearing at the regional appellate level.

——— A hearing before the entire Commission (applicable only in cases where the Regional Directors assumed original jurisdiction).

All decisions by the National Appeals Board on appeals are final.

October 19, 1976
(Date Notice sent)

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(Docket Clerk)

National Appeals Board
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(Check)

COMMISSION COPY—REGIONAL OFFICE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CR-71-110 RFP

UNITED STATES OF AMERICA

v.

JOSEPH CHARLES BONANNO
ALFRED JOHN SALCICCIA
SALVATORE VINCENT BONANNO
aka Bill Bonanno

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
2-14-72	ORD: deft Joseph Bonanno sent. to 5 yrs impr. on each of cts. 3, 4, 5 & 6 to run concurrent under 4208 (a) (2) RFP
8-17-73	Deft. to surrender to Mgr.
10-22-75	deft. sent'd 5 yrs impr. on each of counts 3, 4, 5, & 6 suspended, & deft. if placed on probn. for 5 yrs to run concurrently; deft. to receive credit for time served; ORD for release from custody executed in Open court RFP
2-24-78	REQUEST & ORDER: that B/W issue to deft. JOSEPH C. BONANNO, JR. re: probn. revoc. . . issued B/W this day. RFP
3-2-78	Bench Warrant on return . . . exec. as to deft. Joseph C. Bonanno 2-26-78
6-21-78	MINUTE ORDER re: further proceedings re probn. revoc; Court finds deft. Joseph Bonanno has violated cond. of probation as set forth in opinion. It is hereby ordered probation be revoked; it is hereby ordered that deft. Joseph Bonanno is committed to cust. of AG for 5 yrs as proscribed in the judgt imposed Oct. 22, 1975 on each of cts. 3, 4, 5 and 6 to run concurrently with the other; Deft's motion for stay of exec of judg pending appeal is DENIED w/o prej.
6-29-78	Notice of appeal filed regarding probn. rev.
9-5-78	J and commitment on return execution

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

C75-1027 RFP

JOSEPH CHARLES BONANNO

v.

UNITED STATES OF AMERICA

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
5-22-75	Filed petition to correct sentence
6-23-75	Pltf's OSC hrq 2255 mo
10-3-75	Filed MEMO and ORD; the sent of Bonanno is vacated; the USM is directed to bring Petnr before court for re-sent'g on 10-22-75/9:15 am RFP

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 76-1122

JOSEPH CHARLES BONANNO, JR.

v.

UNITED STATES OF AMERICA

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
2-13-78	Argued & submitted to Merrill, Cummings & Sneed, CJJ. ec
3-3-78	Filed memorandum—Here habeas corpus must be sought from the D.C. for the Central District of California. On the authority of Andrino, the order of the D.C. is vacated and the matter is remanded with instructions to dismiss for lack of jurisdiction.
3-3-78	Filed & Entd Judgment —fn—
3-20-78	Filed appellee's Petition for Rehearing with suggestion for Rehearing in banc and/or Motion to Dismiss the Appeal. (Panel) active judges 3/20 ec
4-26-78	Filed, as of Apr. 21, order (M, CUMMINGS & S) The memorandum filed herein on March 3, 1978 is modified. (For Modification See Case File) Further ordered the petition for rehearing is denied and the suggestion for hearing in banc is rejected.—fn—

EXHIBIT "C"

[SEAL]

UNITED STATES DEPARTMENT OF JUSTICE
UNITED STATES BOARD OF PAROLE

Washington, D.C. 20537

NOTICE OF ACTION

Name—Joseph Charles Bonanno

Register Number—03035-156

Institution—T.I.

In the case of the above-named, the Board has carefully examined all the information at its disposal and the following action with regard to parole, parole status, or mandatory release was ordered:

Designation as Original Jurisdiction and refer to the Regional Directors for Original Jurisdiction consideration January 1975.

Conditions or remarks: _____

Reasons for denial, continuance or revocation:
(Use separate sheet if necessary)

[*Appeals procedure*: You have a right to appeal a decision as shown below. Forms for that purpose may be obtained from your caseworker, and must be filed with the Chief, Classification and Parole, (or his equivalent) within thirty days of the date this Notice was sent.

A. *Decision of a Hearing Examiner Panel.* Appeal may be made to the Regional Director.

B. *Decision of the National Appellate Board referred to it for reconsideration.* Appeal may be made to the Regional Director.

C. *Decision of the Regional Director.* Appeal may be made to the National Appellate Board.

D. *Decision of Regional Directors in cases where they assumed original jurisdiction.* Appeal may be made to the National Appellate Board.] *

October 24, 1974
(Date Notice sent)

Western
(Region-Specify)

KS
(Docket Clerk)

National Appellate Board

(Check)

INMATE COPY

* Bracketed material not applicable.

[SEAL]

UNITED STATES DEPARTMENT OF JUSTICE
UNITED STATES BOARD OF PAROLE

Washington, D.C. 20537

NOTICE OF ACTION

Name—Joseph Charles Bonanno

Register Number—03035-156

Institution—Terminal Island

In the case of the above-named, the Board has carefully examined all the information at its disposal and the following action with regard to parole, parole status, or mandatory release was ordered:

Continue to expiration with an interim progress report at one-third of sentence.

Conditions or remarks: _____

Reasons for denial, continuance or revocation:
(Use separate sheet if necessary)

Your offense behavior has been rated as very high severity. You have a salient factor score of 11. You have been in custody a total of 17 months. Guidelines established by the Board for adult cases which consider the above factors indicate a range of 26-36 months to be served before release for cases with good institutional program performance and adjustment. After careful consideration of all relevant factors and information presented, it is found that a decision outside the guidelines at this consideration appears warranted. Your release at this time would depreciate the seriousness of the offense committed and thus is incompatible with the welfare of society.

Appeals procedure: You have a right to appeal a decision as shown below. Forms for that purpose may be obtained from your caseworker, and must be filed with the Chief, Classification and Parole, (or his equivalent) within thirty days of the date this Notice was sent.

A. *Decision of a Hearing Examiner Panel.* Appeal may be made to the Regional Director.

B. *Decision of the National Appellate Board referred to it for reconsideration.* Appeal may be made to the Regional Director.

C. *Decision of the Regional Director.* Appeal may be made to the National Appellate Board.

D. *Decision of Regional Directors in cases where they assumed original jurisdiction.* Appeal may be made to the National Appellate Board.

January 15, 1975
(Date Notice Sent)

Western
(Region-Specify)

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(Docket Clerk)

National Appellate Board

(Check)

INMATE COPY

[SEAL]

UNITED STATES DEPARTMENT OF JUSTICE
UNITED STATES BOARD OF PAROLE

Washington, D.C. 20537

NOTICE OF ACTION

Name—Joseph Charles Bonanno

Register Number—08035-156

Institution—T.I.

In the case of the above-named, the Board (or its Youth Correction Division) in its offices in Washington, D.C. has carefully examined all the information at its disposal and the following action with regard to parole, parole status, or mandatory release status was ordered.

Referred for Original Jurisdictions consideration.

United States Board of Parole.

WESTERN REGION

KS Date April 21, 1975

INSTITUTION COPY

[SEAL]

UNITED STATES DEPARTMENT OF JUSTICE
UNITED STATES BOARD OF PAROLE

Washington, D.C. 20537

NOTICE OF ACTION

Name—Joseph Charles Bonanno

Register Number—3035-156

Institution—Terminal Isl.—Men's Unit

In the case of the above-named, the Board has carefully examined all the information at its disposal and the following action with regard to parole, parole status, or mandatory release was ordered:

No Change in Board Order dated January 15, 1975. Conditions or remarks: REASONS: Your offense behavior has been rated as very high severity. You have a salient factor score of 11. You have been in custody a total of 21 months. Guidelines established by the Board for adult cases which consider the above factors indicate a range of 26-36 months to be served before release for cases with good institutional program performance and adjustment. After careful consideration of all relevant factors and information presented, it is found that a decision outside the guidelines at this consideration appears warranted. There was no new information deemed significant enough to warrant change in previous order. There was an unusually sophisticated or professional manner evident in the planning or commission of the offense.

Appeals procedure: You have a right to appeal a decision as shown below. Forms for that purpose may be obtained from your caseworker, and must be filed with the Chief, Classification and Parole, (or his equivalent) within thirty days of the date this Notice was sent.

A. *Decision of a Hearing Examiner Panel.* Appeal may be made to the Regional Director.

B. *Decision of the National Appellate Board referred to it for reconsideration.* Appeal may be made to the Regional Director.

C. *Decision of the Regional Director.* Appeal may be made to the National Appellate Board.

D. *Decision of Regional Directors in cases where they assumed original jurisdiction.* Appeal may be made to the National Appellate Board.

May 19, 1975
(Date Notice sent)

(Region-Specify)

NFB
(Docket Clerk)

National Appellate Board
XXX
(Check)

INMATE COPY

SUPREME COURT OF THE UNITED STATES

No. 77-1665

JOSEPH CHARLES BONANNO, JR., PETITIONER

v.

UNITED STATES

ORDER ALLOWING CERTIORARI. Filed December 11, 1978

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. The case is consolidated with No. 78-156 and a total of one hour is allotted for oral argument.

SUPREME COURT OF THE UNITED STATES

No. 78-156

UNITED STATES, PETITIONER

v.

HUGH J. ADDONIZIO, et al.

ORDER ALLOWING CERTIORARI. Filed December 11, 1978

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is consolidated with No. 77-1665 and a total of one hour is allotted for oral argument.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 284988 277

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-156

UNITED STATES OF AMERICA,

Petitioner,

v.

HUGH J. ADDONIZIO,

Respondent.

UNITED STATES OF AMERICA,

Petitioner,

v.

THOMAS J. WHELAN and THOMAS M. FLAHERTY,

Respondents.

RESPONDENT, HUGH J. ADDONIZIO'S BRIEF, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MICHAEL EDELSON
Counsel for Respondent, Hugh J. Addonizio
Gateway I
Newark, New Jersey 07102

SCARPONE & EDELSON
Of Counsel

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

TABLE OF CONTENTS

Cases Cited

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-156

UNITED STATES OF AMERICA,

Petitioner,

v.

HUGH J. ADDONIZIO,

Respondent.

UNITED STATES OF AMERICA,

Petitioner,

v.

THOMAS J. WHELAN and THOMAS M. FLAHERTY,

Respondents.

RESPONDENT, HUGH J. ADDONIZIO'S BRIEF, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Questions Presented

Whether the sentencing court has jurisdiction pursuant to a 28 U.S.C. §2255 motion to vacate and correct a defendant's sentence where new parole guidelines and procedures adopted, published and implemented subsequent to sentencing and prior to defendant's first parole eligibility date fundamentally changed the criteria applied in the parole decisionmaking process thereby thwarting the reasonable intention and expectation of the sentencing court at the time of imposition of sentence.

Statement

A. The parole release system

In 1972 and 1973 the Parole Board (now Parole Commission) radically changed the criteria and procedures applied in the parole decisionmaking process. This was accomplished by the adoption and application by the Parole Board of a guideline table, first as a "pilot project" in 1972 and then with nationwide application in 1973. 28 C.F.R. §2.4 (1973) The adoption of the guideline table represented not only the first time the Parole Board indicated its decisions would be based upon published criteria or guidelines; but substituted the previously accepted principal criterion in parole decisionmaking of rehabilitation for the Parole Board's "independent subjective evaluation of the gravity of the inmate's past criminal behavior". Project, *Parole Release Decisionmaking and the Sentencing Process,* 84 Yale L.J. 810, 822-828 (1975).

It was not until the enactment in 1976 of the Parole Commission and Reorganization Act (appearing as 18 U.S.C. §§4201 through 4218 and repealing the former

§§4201 through 4218 inclusive of Title 18) that specific statutory authority for the published guidelines and the new emphasis on an independent evaluation of the severity of the crime by parole authorities can be found. See 18 U.S.C. §4203(a)(1) and the present §4206(a), which reads:

> "If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, *and if the Commission, upon consideration of the nature and circumstances of the offense* and the history and characteristics of the prisoner determines:
>
> (1) That release would not depreciate the seriousness of his offense or promote disrespect for the law; and
>
> (2) That release would not jeopardize the public welfare; subject to the provisions of subsections (b) and (c) of this section, and pursuant to guidelines promulgated by the Commission pursuant to Section 4203(a)(1), such prisoner shall be released." (Emphasis added)

By contrast, the prior §4203, in effect in 1970 when respondent was sentenced, provided, *inter alia*:

> "If it appears to the Board of Parole from a report by the proper institutional officers or upon application by a prisoner eligible for release on parole, that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole."

Prior to the new guidelines and based upon the then existing statute and Parole Board procedures, it was generally believed by the courts that a defendant sentenced under 18 U.S.C. §4202 (now §4205(a)) would receive meaningful consideration for parole at the one-third point of his sentence. Such consideration was based upon the Parole Board's evaluation of an inmate's progress toward rehabilitation. Rehabilitation was in turn judged primarily by an inmate's adjustment to and behavior at the institution of confinement and upon the observations made of the inmate's attitude by the staff of the institution as well as by members of the Parole Board at the time they conducted their hearing on parole eligibility. Project, *supra.*, Page 820; see also *Hyser* v. *Reed,* 318 F. 2d 225 (D.C. Cir. 1963); *Berry* v. *United States,* 412 F. 2d 189, 192 (3rd Cir. 1969); *United States* v. *Somers,* 552 F. 2d 108, 112 (3rd Cir. 1977).

B. Factual background in respondent Addonizic's case

Respondent was sentenced in September 1970, prior to the adoption of the new guidelines to a straight term of ten years pursuant to then 18 U.S.C. §4202. He first became eligible for parole on July 5, 1975 after having served one-third of his term. He was denied parole at that time and given a new eligibility date of January 1977. On December 8, 1976, a second institutional hearing was held by two hearing officers of the Parole Commission. The hearing was a very short one. The hearing officers did not question Mr. Addonizio or have any discussion with him in an effort to evaluate his progress and rehabilitation or his prospects for successful reintegration into society in the event parole was granted. They simply advised him that they had no authority to grant his application

for parole since he was designated a "central monitoring case". They further told him that they did not really have any questions for him—that with him it was not a question of rehabilitation, it was only a question "of how long they want you to stay here". (Affidavits of Hugh Addonizio dated January 6 and January 8, 1977, made a part of the record on appeal and never disputed by the government at any stage in the proceedings).

It is further undisputed that respondent's prison record was exemplary and that he had received only highest recommendations from the prison authorities. Nevertheless, on January 13, 1977, the National Parole Commission denied parole to respondent and continued him for regular review hearing in December 1977 (his approximate mandatory release date).

The reasons given by the Parole Commission for the denials of parole make clear that its decisions were based upon its own evaluation of the nature and circumstances of respondent's offense. See District Court Opinion (App. E); Third Circuit Opinion (App. A); and *United States Ex Rel. Addonizio* v. *Arnold,* 423 F. Supp. 189, 190 n. 4 (M.D. Pa. 1976).

On April 27, 1977, the sentencing court granted respondent's 28 U.S.C. §2255 motion vacating his original sentence and resentencing respondent to time served. On that date Mr. Addonizio had served five years and two months of his ten year sentence. The court, based upon the authority of the Third Circuit cases of *United States* v. *Salerno,* 538 F. 2d 1005, rehearing denied, 542 F. 2d 628 (3rd Cir. 1976) and *United States* v. *Somers,* 552 F. 2d 108 (3rd Cir. 1976), found it had jurisdiction under 28 U.S.C. §2255, because its reasonable intention and expectations at the time of sentencing had been frustrated by the new standards and procedures adopted subsequent to sentencing.

The court specifically stated that it had carefully considered the severity of respondent's crime in imposing the harsh ten year sentence (Respondent was a first offender. At the time of his conviction he had been serving his second term as Mayor of the City of Newark. Prior thereto he had a distinguished record of public service, including fourteen years as a member of Congress and had been a highly decorated World War II veteran.) and had expected respondent to receive "a meaningful parole hearing—that is, a determination based on his institutional record and the likelihood of recidivism upon completion of one-third (1/3) of his sentence . . . This sentencing expectation was based on the court's understanding—which was consistent with generally-held notions—of the operation of the parole system in 1970." (App. E—28a, 29a)

Instead the court found respondent's parole eligibility to have been decided on a reevaluation of the severity of his crime by the Parole Commission under the new standards and procedures not in existence and not contemplated at the time of sentence.

C. The decision of the Court of Appeals

The Third Circuit agreed that the District Court had jurisdiction to vacate and correct respondent's sentence under the particular circumstances of the case. Following its earlier decisions, the Third Circuit held that relief may be granted to an inmate where the import of the original sentence has been substantially changed as a result of application by the parole authorities of a set of guidelines and procedures not in existence at the time of sentencing and where those new guidelines and procedures

actually frustrate the reasonable intention and expectations of the sentencing judge at the time of sentencing. (App. A—9a)

Reasons for Denying the Petition

1. The holdings of the Third Circuit in those cases where it has found authority of the sentencing court to vacate and correct the sentence are extremely narrow and apply only to a limited set of circumstances and an ever decreasing number of inmates. The instant case must be read together with the earlier Third Circuit cases of *Salerno* and *Somers*.

Despite the government's contention of wide implication of the Court of Appeals' decision (Petition, p. 16, n. 12), the Third Circuit has been extremely careful to limit its holdings to those cases where sentence was imposed prior to the publication of the new guidelines in 1973 and where there can be a clear showing that the new guidelines and procedures have resulted in requiring an inmate to serve an appreciable longer term of imprisonment than could have been reasonably expected and intended at the time of imposition of sentence (App. A—9a). On the denial of the government's petition for rehearing in *Salerno*, 542 F. 2d 628 (3rd Cir. 1976), the Court stated:

> "Our holding is narrow and does not vest sentencing courts, as alleged by petitioner 'with power of a super parole board'. Our decision does, however, 'permit the district court to correct a sentencing error where the import of the judge's sentence has in fact been changed by guidelines adopted by the Parole Board . . . subsequent to the imposition of that sentence.' United States v. White, 540 F. 2d 409, at 411 (8th Cir. 1976)."

In *Somers* the court again emphasized the limited nature of its ruling on the issue stating:

> "We recognize the sentencing courts are not vested with those functions belonging to the Parole Board, D'Allesandro v. United States, 517 F. 2d 429 (2nd Cir. 1975) or 'with [the] power[s] of a super parole board.' Silverman II, supra. [Salerno Rehearing Decision]" 552 F. 2d 108, 114 (3rd Cir. 1977)

In short, the rule of the Third Circuit cases has no application to sentences imposed subsequent to the fall of 1973 and does not have "wide implications". If certiorari is granted, it is respectfully submitted that by the time a decision on the issue is rendered by this Court the population to which the case would apply would be all but non-existent.

2. The decisions of the Third and Eighth Circuits sought to be challenged by petitioner are well-reasoned, not inconsistent with decisions of this Court, and are based upon a thorough analysis and understanding of the changes in the parole decisionmaking process which occurred in 1973 and the prior unanticipated effect on sentences imposed prior to that time. It is respectfully submitted that the Third and Eighth Circuit cases holding inmates have a remedy under 28 U.S.C. §2255 under the facts and circumstances to which those cases are limited is entirely consistent with this Court's opinion in *Davis* v. *United States*, 417 U.S. 333.

While it cannot be disputed that there is a conflict in the Circuits on the issue, the conflict is not as clear-cut as would first appear. The Ninth Circuit, for example, in rejecting the reasoning of the Eighth Circuit in *Kortness* v. *United States*, 514 F. 2d 167 (8th Cir. 1975) and the Third Circuit cases stated:

> "The *Kortness* court may have been influenced by the Eighth Circuit's rule that decisions to grant or deny parole are not subject to judicial review. Brest v. Ciccone, 371 F. 2d 981 (8th Cir. 1967). In contrast our Circuit permits the limited judicial review. E.g. Grottan v. Sigler, 525 F. 2d 329 (9th Cir. 1975)." *Andrino* v. *United States Board of Parole*, 550 F. 2d 519, 520 n.3 (9th Cir. 1977).

3. We submit that it is appropriate for this Court in its determination of whether or not to grant certiorari to consider the particular factual and personal background of respondent. Because he was a prominent public official at the time he was brought to trial, Mr. Addonizio's case was and continues to be followed closely by the press. The facts that six original co-defendants (five public officials and the reputed head of organized crime in New Jersey) were severed at the beginning of or during the trial either because of health reasons or unavailability of their trial counsel and never brought to final judgment, and that the two co-defendants convicted with Addonizio who received the same sentence as he were paroled a year before Addonizio's release by the court have been widely and repeatedly publicized in the press. The extraordinary effort of the government to have Addonizio reincarcerated pending the appeal from the District Court's granting of his §2255 motion also received wide publicity and adverse reaction from public officials and the general public alike at what appeared to be unduly harsh and oppressive treatment. (The Third Circuit ordered Addonizio reincarcerated pending the appeal and after having been out of prison from April 28, 1977, Mr. Addonizio was required to surrender himself for reincarceration on May 3, 1977. He remained in custody until May 12, 1977, when he was re-released by order of this Court.) Respondent has now been out of prison since May 12, 1977.

Given the past history of Mr. Addonizio's case, we respectfully submit it is unjust and unreasonable at the present time to require him to litigate an issue of extremely limited applicability and have to continue to face uncertainty about his personal status.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1978

No. 78-156

UNITED STATES OF AMERICA,

Petitioner,

—*v*—

HUGH J. ADDONIZIO,

Respondent.

UNITED STATES OF AMERICA,

Petitioner,

—*v*—

THOMAS J. WHELAN and THOMAS M. FLAHERTY,

Respondents.

BRIEF OF RESPONDENTS THOMAS J. WHELAN AND THOMAS M. FLAHERTY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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TABLE OF CONTENTS

TABLE OF CASES, STATUTES, RULES & TEXTS

QUESTION PRESENTED

Whether the sentencing Court has jurisdiction pursuant to the post-sentencing relief of 28 U.S.C. §2255 upon a showing that the sentencing Judge's expectations were frustrated by the subsequent changes in criteria considered by the Parole Commission granting or denying release, which changes fundamentally altered the criteria previously applied in the parole decision-making process employed by the Parole Commission.

STATEMENT

A. THE PAROLE RELEASE SYSTEM

Subsequent to respondents' sentencing in August of 1971, the Parole Commission substantially changed the criteria and procedure originally applied to parole determination. The extent of this criteria and procedure, together with its ramifications on the matter in issue before this Court is extensively discussed on pages 2 through 4 of the Brief in Opposition of Respondent Hugh J. Addonizio. Respondents Whelan and Flaherty respectfully endorse the same.

B. FACTUAL BACKGROUND IN THE CASE OF U.S.A. v. THOMAS J. WHELAN AND THOMAS M. FLAHERTY

Respondents Whelan and Flaherty were sentenced to 15 years imprisonment on October 10, 1971 by Judge Shaw in the United States District Court for the District of New Jersey at Newark after having been convicted of two counts of conspiracy to commit extortion and 27 counts of extortion in violation of 18 U.S.C. 1951 and 1952. At the time respondents were sentenced the Federal parole determination guidelines had not been adopted by the Parole Commission. Both respondents Whelan and Flaherty were sentenced pursuant to 18 U.S.C. 4205(a) and thereby became eligible for parole in June of 1976.

Respondents had served in excess of 50 months in Federal custody at the time of their first hearing for parole determination.

The respondents' prison records were undisputably classified as exemplary. Their records regarding their adjustment to program, process and rehabilitation were outstanding. As a result of the stability demonstrated by both respondents, it was clearly apparent that no recidivistic tendencies were present in either respondents' record. Their behavioral pattern demonstrated the fact that they would be of no danger to society if they were to be released on parole. Nevertheless, on June 12, 1976, the National Parole Commission denied parole to the respondents, and continued them for a regular review hearing in June of 1978.

The reasons given by the Parole Commission for the denials of parole made it clear that its decision was based upon its own evaluation of the nature and circumstance, that is the severity, of the respondents' offense. The respondents accordingly appealed the parole determination to the National Appellate Board on October 18, 1976. Upon receipt of the Appellate Board's affirmation of the June 12th parole denial, respondents commenced a Habeas Corpus proceeding pursuant to Title 28 U.S.C. §2255 in the United States District Court for the District of New Jersey on November 22, 1976.

On March 3, 1977, United States District Court Judge Biunno denied the respondents' applications on the grounds that the Court had no jurisdiction to make a determination on the issues before it. Judge Biunno specifically rejected the Third Circuit authority of *United States v. Salerno,* 538 F.2d 1005, reh. den. 542 F.2d 628 (3rd Cir. 1976) and *United States v. Somers*, 552 F.2d 108 (3rd Cir. 1976). He additionally suggested that the proper forum for the respondents' application was the Middle District of Pennsylvania, the District in which the respondents were incarcerated.

Respondents accordingly appealed the Biunno decision and order to the United States Court of Appeals for the Third Circuit, and simultaneously commenced a Habeas Corpus proceeding pursuant to 28 U.S.C. §2241 in the United States District Court for the Middle District of Pennsylvania. In September of 1977, Judge Muir denied respondents' petition for Habeas Corpus. The District Judge further indicated that the proper forum for the respondents' application was the District of New Jersey. Respondents thereafter appealed to the United States Court of Appeals for the Third Circuit, where the Pennsylvania appeal was consolidated with the New Jersey appeal and then jointly heard with the Addonizio appeal taken by the Government.

C. THE DECISION OF THE COURT OF APPEALS

The United States appealed from the reduction of the Addonizio sentence while respondents Whelan and Flaherty appealed from the denial of relief in both New Jersey and Pennsylvania. The Third Circuit, in its decision, determined that the District of New Jersey had jurisdiction to vacate and correct the respondents' sentences under the particular circumstances of the case. Following its earlier decisions, the Third Circuit held that relief may be granted to an inmate, where the import of the original sentence had been substantially changed as a result of the application by the Parole authorities of a set of guidelines and procedures not in existence at the time of sentencing, and where those new guidelines and procedures actually frustrated the reasonable intention and expectations of the Sentencing Judge at the time of sentencing. The decision of the Third Circuit specifically rejected the reasoning of Judge Biunno's jurisdictional denial of respondents' application. The Third Circuit remanded the respondents' application to Judge Biunno for reconsideration on the merits in light of the comment set forth in the Circuit Court decision.

REASONS FOR DENYING THE PETITION

The primary thrust of Petitioner's application for certiorari centers around the proposition that the decision of the Third Circuit is in direct conflict to the Circuit Court opinions of the First, Second, Sixth, Seventh and Ninth Circuits. While respondents do not dispute that there is a conflict in the Circuits regarding this issue, it is respondents' position that conflict between jurisdiction, standing by itself, does not satisfy the jurisdictional requirement for certiorari. Rule 19(1)(b) of the Revised Rules of the Supreme Court of the United States states:

> "A review on certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following *while neither controlling nor fully measuring the Court's discretion* indicate the character of reasons which will be considered:
>
> "(b) Where a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter;..." (emphasis added)

Under color of the above Rule this Court usually will grant certiorari where the decision of the Federal Court of Appeals, as to which review is sought, is in direct conflict with the decision of another Court of Appeals on the same matter of Federal law, or on the same matter of general law as to which Federal Courts can exercise independent judgments. Therefore, a square and irreconcilable conflict ordinarily will be enough to secure review.

Despite this basic premise there is increasing evidence that the existence of a conflict, without more, is not always enough to convince the Court that certiorari should be granted. Evidence of this changing trend is contained in the words of Mr. Justice Harlan, where he stated:

> "Even where a 'true' conflict may be said to exist, certiorari will sometimes be denied where it seems likely that a conflict may be resolved as a result of future cases in the Court of Appeals, or where the impact of the conflict is narrowly confined, and is not apt to have continuing future consequences, as where a statute which has given rise to conflicting interpretation has been repealed or is to expire. The nub of all these qualifications is that a conflict of decision may be safely relied on as a ground for certiorari only in instances where it is clear that the conflict is one that can be effectively resolved only by the prompt action of the Supreme Court alone."

(Some Aspects of the Judicial Process in the Supreme Court of the United States, 33 Aust. L.J. 108 (1959)).

A review of this Court's denials of certiorari and subsequent dismissals of the grant of certiorari after certiorari had been granted, reveals this Court's concern that something more than mere conflict between Circuit Courts exist in order for certiorari to be granted.

The granting of certiorari is a judicial determination and not an administerial function. The quality of the petition must be carefully weighed by the Court. *The Monrosa v. Carbon Black Exports, Inc.*, 359 U.S. 180, 184; 79 S.Ct. 710, 713; 3 L.Ed. 2d 723 (1959). This Court, in dismissing certiorari, in the above cited case stated:

> "While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflict between the Courts of Appeals is judicial, not simply administrative or managerial."

In *United States v. Abrams,* 197 F.2d 803 (6th Cir. 1952); cert. den. 344 U.S. 855; 73 S.Ct. 92; 97 L.Ed. 664 (1952), this Court denied certiorari despite the fact that the finding of the Sixth Circuit was in direct conflict with determinations rendered by the Third Circuit and the respondent acknowledged the conflict.

Similarly, there have been numerous cases reviewed by this Court wherein certiorari was dismissed after certiorari had first been granted. The common thread in each of these cases was first discussed in *Layne & Bowler Corp. v. Western Well Works,* 261 U.S. 387, 393; 43 S.Ct. 422, 423; 63 L.Ed. 712 (1923), where this Court stated that:

> "Certiorari is granted only in cases involving principles, the settlement of which is important to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals."

See also *NLRB v. Pittsburgh S.S. Co.,* 340 U.S. 498; 71 S.Ct. 453, 95 L.Ed. 479; *U.S. v. Jordan,* 342 U.S. 388, 396; 72 S.Ct. 286, 287; 96 L.Ed. 321 (1952); *McAllister v. U.S.,* 348 U.S. 19, 25; 75 S.Ct. 6, 10, 99 L.Ed. 2 (1954); *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S., 70, 79; 75 S.Ct. 614, 619-620; 99 L.Ed. 897 (1955). Respondents acknowledge that a conflict in circuits does exist. However, the additional elements necessary in order to grant certiorari do not exist in the instant case. The implications of the Third Circuit decision are personal to the litigants, extremely narrow and limited in scope. The Third Circuit deliberately and cautiously restricted its holding to those types of cases where the sentence was imposed prior to the publication of the new guidelines in 1973, and where it could be clearly established that the new guidelines and procedures resulted in requiring the inmate to serve an appreciably longer term of imprisonment than could have been reasonably expected or intended at the time of the imposition of sentence.

Despite the fact that petitioner's application demonstrates an acknowledged conflict in jurisdiction, it is patently defective in establishing the fact that the matter posed for consideration is of importance to the public as distinguished from its prime importance to the parties. In addition, petition fails to establish, that the Third Circuit opinion is apt to have substantial continuing future consequences that can only be resolved by Supreme Court intervention. The two cases presented to this Court clearly lack the essential special circumstances which must exist in order for certiorari to be granted, despite the patent conflict of circuits.

CONCLUSION

The petition for Writ of Certiorari should be denied.

Dated: White Plains, New York
October 13, 1978

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Nos. 77-1665 and 78-156

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOSEPH CHARLES BONANNO, JR., PETITIONER

v.

UNITED STATES OF AMERICA

UNITED STATES OF AMERICA, PETITIONER

v.

HUGH J. ADDONIZIO

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS J. WHELAN and THOMAS M. FLAHERTY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH AND THIRD CIRCUITS

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INDEX

Argument—Continued

CITATIONS

Cases:

Cases—Continued

Cases—Continued

Cases—Continued

Constitution, statutes, rules and regulations:

Constitution, statutes, rules and regulations—Continued

Miscellaneous:

Miscellaneous—Continued

Miscellaneous—Continued Page

Miscellaneous—Continued Page

In the Supreme Court of the United States

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THOMAS J. WHELAN and THOMAS M. FLAHERTY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH AND THIRD CIRCUITS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals in No. 78-156 (78-156 Pet. App. 1a-21a) is reported at 573 F.2d 147. The opinion of the district court in *Addonizio* (78-156 Pet. App. 27a-32a) is not reported. The first opinion of the United States District Court for the District of New Jersey in *Whelan* (78-156 Pet. App. 33a-42a) is reported at 427 F. Supp. 379. The two additional opinions of that court (78-156 Pet. Supp. App. 5-13) are not reported. The opinion of the United States District Court for the Middle District of Pennsylvania in a related proceeding involving respondents Whelan and Flaherty (78-156 Pet. App. 43a-50a), in which no review was sought in this Court, is not reported.

The opinion of the court of appeals in No. 77-1665 (77-1665 Pet. App. 22-25) is not reported. The opinion of the district court in that case (77-1665 Pet. App. 11-21) is not reported.

JURISDICTION

The judgments of the court of appeals in No. 78-156 (78-156 Pet. App. 22a-26a) were entered on February 27, 1978. On May 19, 1978, Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including July 27, 1978, and the petition was filed on that date. The judgment of the court of appeals in No. 77-1665 was entered on March 3, 1978. A petition for rehearing was denied on April 21, 1978 (77-1665 Pet. App. 26-27). The petition for a writ of certiorari was filed on May 22, 1978. The petitions were granted and the cases consolidated on December 11, 1978. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a district court may revise a lawful sentence on collateral attack when decisions of the Parole Commission "frustrated the sentencing judge's expectations."

STATUTES AND RULES INVOLVED

1. 18 U.S.C. 4205(a) provides:

   Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law.

2. 18 U.S.C. 4205(b) provides:

   Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maxi-

mum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine.

3. 28 U.S.C. 2255 provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> * * * * *
>
> If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

4. Fed. R. Crim. P. 35 provides:

> The court may correct an illegal sentence at any time and may correct a sentence imposed

> in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law.

5. Fed. R. Crim. P. 45(b) provides in part:

> the court may not extend the time for taking any action under Rules 29, 33, 34 and 35, except to the extent and under the conditions stated in them.

STATEMENT

A. Addonizio

Following a jury trial in the United States District Court for the District of New Jersey, Hugh J. Addonizio was convicted of conspiring to interfere with interstate commerce by extortion, and on 63 counts of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951. The evidence demonstrated that Addonizio, while Mayor of Newark, New Jersey, had engaged in an extensive conspiracy to extort money from persons doing business with the City. District Judge Barlow sentenced him on September 22, 1970, to 10 years' imprisonment and a fine of $25,000. The court

of appeals affirmed. *United States* v. *Addonizio*, 451 F.2d 49 (3d Cir.), cert. denied, 405 U.S. 936 (1972).

Addonizio's sentence was imposed under what is now 18 U.S.C. 4205(a), and he became eligible for parole on July 3, 1975, after serving one-third of his sentence. On July 8, 1975, the Parole Commission, after a hearing, denied parole and determined that release within the applicable guideline range of 26-36 months was not warranted because of the gravity of the offense (A. 13-14).[1] It set another hearing for January 1977. On January 13, 1977, the Commission again denied release and scheduled a further hearing for December 1977 (A. 11-12). The Commission explained that Addonizio's crimes were so extensive and demonstrated such a breach of public trust that a decision to release him would depreciate the seriousness of his offenses and promote disrespect for the law (A. 11-12).

Addonizio filed a motion, invoking the district court's jurisdiction under 28 U.S.C. 2255, asking the court to resentence him to time served (A. 15). Judge Barlow stated that in sentencing Addonizio he had expected him to be confined "for a period of approximately three and one-half to four years" (78-156 Pet. App. 28a) and to be held longer only if he had a poor institutional record. Judge Barlow explained that he had not anticipated that the Commission would give significant emphasis to the gravity of Addonizio's offenses, and he concluded that because of this emphasis Addonizio "has not received the type of meaningful parole hearing contemplated by the Court" (*id.* at 30a). After determining that he had jurisdiction under 28 U.S.C. 2255 to reduce any sentence concerning which his expectations had been frustrated (*id.* at 31a-32a), Judge Barlow reduced Addonizio's sentence to time served as of April 27, 1977.[2]

[1] See pages 26-31, *infra*, for a description of the guideline system.

B. Whelan and Flaherty

Following a jury trial in the United States District Court for the District of New Jersey, Thomas J. Whelan and Thomas M. Flaherty were convicted on two counts of conspiracy to commit extortion and 27 counts of extortion, in violation of 18 U.S.C. 1951 and 1952. Whelan was the Mayor, and Flaherty a city councilman, of Jersey City, New Jersey (78-156 Pet. App. 50a). The evidence showed that they and others extorted at least $1.2 million from persons doing business with the City and deposited those sums in numbered accounts in Florida. The money has never been recovered. See *id.* at 34a-36a, 49a-50a.

[2] The court of appeals stayed the order reducing Addonizio's sentence. This Court then vacated the order of the court of appeals. *Addonizio* v. *United States*, 431 U.S. 909 (1977).

By the time Addonizio was released he had served five years and two months of his 10-year sentence. His earned good time gave him a projected mandatory release date of March 18, 1978. The reduction of his sentence thus relieved him of slightly less than a year of additional incarceration and about four years of conditional liberty subject to parole supervision.

On August 10, 1971, District Judge Shaw sentenced Whelan and Flaherty to 15 years' imprisonment each. In light of a plea agreement on tax evasion charges, Whelan and Flaherty did not appeal their convictions.[3] They did, however, file motions for reduction of sentence pursuant to Fed. R. Crim. P. 35, and Judge Shaw denied those motions on May 16, 1972 (78-156 Pet. App. 40a-41a). The court of appeals affirmed on December 8, 1972 (*id.* at 41a). Respondents then filed an action under 28 U.S.C. 2255 contending that their sentences were arbitrary and excessive, but Judge Shaw denied relief on December 12, 1973, and the court of appeals again affirmed (78-156 Pet. App. 41a).

Whelan and Flaherty, like Addonizio, were sentenced under what is now 18 U.S.C. 4205(a). They thus became eligible for parole in 1976, after serving one-third of their sentences. The Parole Commission held a hearing in June 1976; on July 7, 1976, it denied their applications for parole and set June 1978 as the date for the next hearing (A. 60-61, 66-67). The Commission explained that the guideline ranges for respondents indicated that they should serve a total of 26 to 36 months' imprisonment, but that respondents would not be released because their offenses were part of large-scale organized criminal activity and involved a breach of the public trust (A. 60, 66).

[3] The tax evasion sentences, which were affirmed by the court of appeals, run concurrently with the extortion sentences. See *United States* v. *Kenny*, 462 F.2d 1205 (3d Cir.), cert. denied, 409 U.S. 914 (1972).

Whelan and Flaherty then filed two suits challenging their confinement. One, invoking jurisdiction under 28 U.S.C. 2255, was filed in the sentencing court. It was assigned to Judge Biunno, because Judge Shaw had died. The other, invoking jurisdiction under 28 U.S.C. 2241, was filed in the district of confinement (the Middle District of Pennsylvania) and assigned to Judge Muir.

Judge Biunno decided the Section 2255 case in March 1977 (78-156 Pet. App. 33a-42a). He concluded that most of the arguments were "a rehash of what was argued before Judge Shaw" (*id.* at 35a) and that the only new point was a contention that decisions of the Parole Commission had frustrated Judge Shaw's sentencing intent. Judge Biunno stated (*ibid.*): "[T]he real issue is whether the Parole Commission's denial of parole was arbitrary and capricious." After examining the nature of Whelan and Flaherty's crimes, Judge Biunno concluded that the Commission properly denied parole because "[t]he spectacle of Whelan and Flaherty being paroled and free to escape with their ill-gotten gains" would be "revolting" (*id.* at 36a). Judge Biunno also examined the statements Judge Shaw had made during earlier proceedings and determined that "a resentencing now would inevitably frustrate Judge Shaw's intent on sentencing" (*id.* at 37a n.2). Judge Biunno therefore denied respondents' motion to reduce sentence.

Judge Muir decided the Section 2241 case in September 1977 (78-156 Pet. App. 43a-50a). He con-

cluded that a court sitting in habeas corpus may correct arbitrary and capricious decisions by the Commission (*id.* at 47a-48a). He held, however, that it was appropriate for the Commission to deny parole to Whelan and Flaherty in light of the nature of their crimes (*id.* at 49a-50a). He therefore denied the petitions for habeas corpus.

C. Bonanno

Following a jury trial in the United States District Court for the Northern District of California, Bonanno was convicted on three counts of collecting debts by extortionate means, in violation of 18 U.S.C. 894, and on one count of conspiring to do so, in violation of 18 U.S.C. 371. He was sentenced by District Judge Peckham to concurrent terms of five years' imprisonment, and the court of appeals affirmed. *United States* v. *Bonanno*, 467 F.2d 14 (9th Cir. 1972), cert. denied, 410 U.S. 909 (1973).

Bonanno's sentences were imposed under 18 U.S.C. (1970 ed.) 4208(a)(2), which is now 18 U.S.C. (1976 ed.) 4205(b)(2), making him eligible for parole at any time in the discretion of the Parole Commission. Bonanno began serving his sentence on August 17, 1973 (77-1665 Pet. App. 13). He had a parole hearing on October 3, 1974; on January 15, 1975, the Commission denied his application for parole and concluded that he should serve all of his sentence (A. 75-76). (The Commission called for a progress report after completion of one-third of the sentence, thus holding open the possibility that it

might change its mind.)[4] Although the Commission explained that, under its parole release guidelines, the ordinary period of confinement for someone with Bonanno's offense and offender characteristics would be between 26 and 36 months, the Commission decided to require Bonanno to serve all of his sentence because of the seriousness of his particular offenses (A. 75).

On May 22, 1975, Bonanno filed a motion, invoking the district court's jurisdiction under 28 U.S.C. 2255, asking that court to reduce his sentence (77-1665 Pet. App. 1-10). He argued that the court, by imposing sentence pursuant to 18 U.S.C. 4205(b)(2), had intended that he be paroled no later than the completion of one-third of his maximum term, given good institutional conduct. Judge Peckham granted this motion (77-1665 Pet. App. 11-21). He suspended Bonanno's sentences and placed him on five years' probation (*id.* at 24). Bonanno was released in October 1975.

Judge Peckham stated that, when he sentenced Bonanno, he had expected "institutional adjustment of the defendant * * * to be the most important consideration * * * in deciding whether or not to grant parole" (77-1665 Pet. App. 16). The judge found that it amounted to a "failure" (*ibid.*) for the Commission not to have considered Bonanno's institutional conduct. This, coupled with the Commission's "par-

[4] On May 19, 1975, following receipt of the interim progress report, the Commission informed Bonanno that there would be no change in its original decision not to grant him parole (A. 78-79).

tial" reliance on the guideline regulations adopted after the sentencing, led Judge Peckham to conclude that the Commission's decision "does not comport with the exceptions [*sic*] or intentions of this court at the time of sentencing" (*ibid.*). The judge also concluded that he had jurisdiction under 28 U.S.C. 2255 to revise a sentence if actions of the Commission should frustrate his sentencing intentions (77-1665 Pet. App. 17).

D. The Decisions Of The Courts Of Appeals

1. *Addonizio, Whelan and Flaherty*

a. The United States appealed from the reduction of Addonizio's sentence, and Whelan and Flaherty appealed from the denials of relief in both of their cases. The Third Circuit affirmed Judge Muir's decision, holding that Judge Muir had stated the proper standard and applied it correctly (78-156 Pet. App. 20a).[5] The court reversed Judge Biunno's decision denying relief to Whelan and Flaherty and affirmed the decision granting relief to Addonizio.

The court of appeals first held that district courts have jurisdiction to revise sentences under 28 U.S.C. 2255. It characterized Section 2255 and Fed. R. Crim. P. 35—which allows reduction of sentence within 120 days after the sentence becomes final—as simply alternate methods of sentence review (78-156 Pet.

[5] Whelan and Flaherty did not seek review of this judgment—nor, of course, did we—and it therefore has become final.

App. 4a-6a). Then, building on three earlier cases,[6] it held that a district court may revise a sentence, lawful when imposed, in response to parole decisions that frustrate its sentencing intent. The governing principle, the court stated, is that because judges have "near-absolute control over maximum punishment, it would necessarily follow that the sentencing judge's intentions and expectations as to actual time of incarceration should be vindicated to the [maximum] extent possible" (*id.* at 9a). The court continued: "regard for the integrity of the sentencing court, as well as concepts of decency and fair play, dictate that the court should be in a position to vindicate [its] original intentions and expectations" (*ibid.*).

These "moral considerations" (78-156 Pet. App. 9a), the court explained, are especially applicable when there has been a "post-sentencing change in criteria governing parole determinations" (*ibid.*). The court thought that there had been such a change here, not so much because of the introduction in 1973 of a system of guidelines (for Addonizio, Whelan and Flaherty had been held in prison beyond the periods projected by the guidelines for ordinary cases), but because it believed that the Commission formerly did not consider the seriousness of the offense in deciding whether to grant parole. At the time Addonizio, Whelan and Flaherty were sentenced, the court stated,

[6] *United States* v. *Salerno*, 538 F.2d 1005 (3d Cir.), rehearing denied, 542 F.2d 628 (1976); *United States* v. *Somers*, 552 F.2d 108 (3d Cir. 1977); *United States* v. *Solly*, 559 F.2d 230 (3d Cir. 1977).

sentencing courts "operated under the assumption that, given a good institutional record, and aside from a finding of probable recidivism, the [Commission] would generally grant parole upon the completion of one-third of the sentence" (*id.* at 11a). Because that assumption does not accord with the Commission's practice, the court found that the Commission's release policy frustrates the expectations of judges who imposed sentences before the change.

The court of appeals found this enough to require affirmance of the decision in Addonizio's case, because the sentencing judge explicitly stated that his intent had been frustrated (78-156 Pet. App. 12a-18a). Moreover, the court concluded, the Commission was not entitled to deny parole for the same reason that the sentencing judge had considered in imposing sentence—the seriousness of the offense. It stated (*id.* at 16a): "Traditional standards of criminal justice reject this apparent double punishment for the same factor—one punishment imposed by the sentencing court, the other by the Parole Commission." As to Whelan and Flaherty, the court ruled that they "should have the benefit of the rule this court announces today" (*id.* at 19a) and that Judge Biunno must reconsider the case to determine whether Judge Shaw's intent had been frustrated.

b. Because the government did not seek a stay of the judgment of the court of appeals concerning Whelan and Flaherty, the district court began the remand proceedings required by the court of appeals. On July 21, 1978, before the district court issued an

order, the National Appeals Board of the Parole Commission decided to release Whelan and Flaherty on parole on August 10, 1978. The district court then filed an opinion stating that the case was moot because Whelan and Flaherty had received adequate relief (78-156 Pet. Supp. App. 5-10). The court's opinion also questioned the assumptions of the court of appeals concerning the amount of time prisoners sentenced during or prior to 1973 could expect to serve before release on parole (*id.* at 8-9). Judge Biunno computed the length of time that persons sentenced by Judge Shaw had served, and the computations established that many persons sentenced during or prior to 1970 had served a good deal more than one-third of their sentences.

Both the United States Attorney and counsel for Whelan and Flaherty then wrote to Judge Biunno, stating that the release of Whelan and Flaherty on parole did not moot the case. Judge Biunno wrote a supplemental opinion (78-156 Pet. Supp. App. 11-14), stating that although the case was not moot "in the usual sense" (*id.* at 11), there was no need to pass on the motions for reduction of sentence.

Before learning of Judge Biunno's second opinion, the Parole Commission voted to defer the release of Whelan and Flaherty pending completion of further investigation. Information in the possession of the Commission indicated that Whelan and Flaherty had not been entirely candid with the Commission concerning the status of the monies they had wrongfully obtained. The Commission set a hearing for October

1978 to consider pre-release rescission of the parole that had been granted to Whelan and Flaherty.

Whelan and Flaherty promptly requested the district court to reinstate and grant their motions for reduction of sentence. Judge Biunno vacated his earlier decisions concerning mootness and on August 23, 1978, reduced their sentences (78-156 Pet. Supp. App. 15-20). Judge Biunno did not write an opinion explaining this reduction, but he did give an oral statement of reasons.[7] The terms of the new sentences

[7] Judge Biunno reviewed the records concerning Judge Shaw's sentence and concluded that the 15-year sentences were substantial but not close to the maximum that court might have imposed. Although matters were "equivocal on the critical question of whether Whelan and Flaherty have established as a matter of fact a frustration of Judge Shaw's sentencing intent and expectation" (Aug. 23, 1978, Tr. 75), Judge Biunno concluded that Judge Shaw had considered the seriousness of the crimes in imposing sentence. Under these circumstances, Judge Biunno stated, the Third Circuit's position is that the Commission's consideration of the seriousness of the crimes "as a matter of law * * * frustrates the sentencing Judge's intention" (*id.* at 70). Judge Biunno also looked at the median time for the parole of persons sentenced by Judge Shaw; he found that Whelan and Flaherty had been held slightly longer than the median (*id.* at 76-77). Judge Biunno concluded (*id.* at 77): "in light of the ruling by the Court of Appeals that the seriousness of the offense of itself cannot be taken into account twice, the Court considers itself bound thereby and accordingly obliged to correct the sentence, regardless of its own views on the subject. However, it does not appear that a sentence to time served would be an appropriate remedy to be fashioned. This is because Judge Shaw would have naturally expected that when released on parole defendants would remain subject to parole supervision for the remainder of the 15-year terms."

required the immediate release of Whelan and Flaherty on accumulated good time credits. On September 5, 1978, Whelan and Flaherty filed notices of appeal from the terms of their August 1978 reduction of sentence and release. On October 3, 1978, the United States filed a cross-appeal. Those appeals are pending before the Third Circuit. As required by Judge Biunno's order, however, Whelan and Flaherty have been released.[8]

2. *Bonanno*

a. The Ninth Circuit reversed the order of the district court suspending Bonanno's sentence (77-1665 Pet. App. 22-25). Relying on *Andrino* v. *United States Board of Parole*, 550 F.2d 519 (9th Cir. 1977), the court held that the district courts do not have jurisdiction to reduce sentences in response to parole decisions, and that the only remedy for arbitrary or capricious action by the Commission is a petition for a writ of habeas corpus in the district of the prisoner's confinement.

b. While the case was pending in the court of appeals, Bonanno remained free on the probation that had been substituted for his original sentence. In February 1978 the probation office accused Bonanno

[8] These subsequent proceedings do not affect this case. If, as we argue, the courts do not have authority to revise sentences in response to parole decisions or changes in parole policies, then this Court should reverse the judgment of the court of appeals. Following the reversal, the district courts would be required to annul the sentence revisions and to restore the original sentences. See *Mancusi* v. *Stubbs*, 408 U.S. 204, 205-207 (1972).

of four violations of the conditions of his probation. *United States* v. *Bonanno*, 452 F. Supp. 743, 746 (N.D. Cal. 1978). Probation revocation proceedings were commenced. The court of appeals' judgment reversing Judge Peckham's resentencing was entered on March 3, 1978, but the district court held a hearing on the probation revocation before it received the court of appeals' mandate, and it concluded that Bonanno had violated the terms of his release. *Ibid.* (Because the district court had not received the mandate, all parties proceeded on the assumption that the probation continued to be in force. See 452 F. Supp. at 745 n.2.) On June 22, 1978, Judge Peckham revoked Bonanno's probation and ordered him to serve the five year term that had been imposed and suspended in October 1975 as a substitute for the concurrent five year terms originally imposed in 1972.

Bonanno consequently is serving a sentence of five years' imprisonment, the same length of imprisonment he was serving when he sought relief from the district court. The time Bonanno served under the original sentence has been credited to the service of his sentence following revocation of probation. Unless he commits disciplinary infractions while in prison, Bonanno will be released on accumulated good time credits on December 23, 1979, the same day that he would be released under the judgment of the court of appeals.[9]

[9] Because Bonanno has appealed from the order revoking his probation, there is one way in which the Court's judgment in the present case might affect his rights. If this Court should reverse the judgment of the court of appeals, then the district court's order placing Bonanno on probation would stand. If the court of appeals then should reverse the district court's order revoking Bonanno's probation, he would be released from prison. On the other hand, if this Court should affirm the judgment of the court of appeals, then Bonanno will remain in prison until December 1979 whether or not he violated the terms of his probation; any possibility of earlier release would be entirely in the hands of the Parole Commission. This potential difference means that the case is not moot.

SUMMARY OF ARGUMENT

A

This case involves questions about the allocation of authority to determine how long a convicted prisoner remains in jail.

Courts have the authority to select maximum terms of imprisonment from the terms authorized by Congress. They also can select minimum terms, but the minimum term cannot exceed one-third of the maximum they select. During the period between the prisoner's first eligibility for parole and the mandatory release date set by the accumulation of good time credits, the Parole Commission has substantial discretion to decide whether to grant release.

Until 1972 the Commission exercised that discretion case by case, using few explicit standards. But when studies showed that the Commission's decisions were in fact generally a product of the severity of the offense and a few basic personal characteristics of the prisoner, the Commission adopted a set of guidelines that announced these criteria and took them into account in a more formal way. The guidelines ensure

greater uniformity but essentially codify the considerations that the Commission has used for some years.

B

Congress has allocated to judges the power to select outer limits on imprisonment and to the Commission the power to set a release date within these limits. This division of responsibilities reduces the demands of prisoners on judicial time, enables the Commission to smooth out the disparity in sentence length that is associated with sentencing by individual judges, and permits experienced penologists to assess each prisoner's release prognosis.

1. The foundation for the Third Circuit's holding that sentencing judges can revise sentences if the decisions of the Commission frustrate the expectations the judges had when imposing sentence is that, if judges can control the maximum term of confinement, they necessarily must be able to control the actual date of release. That is a non sequitur. It amounts to simple disagreement with the statutes that commit the release decision to an independent commission within the Executive Branch. Unless the decisions of the Commission sometimes differ from those that judges would have made, there would be little point in having a Commission. And unless the Commission can disappoint judges' expectations it cannot reduce the effects of the disparate sentencing practices of individual judges.

So long as Congress adheres to its decision that release determinations should be made by an inde-

pendent body, courts cannot insist that that body exercise its discretion in any particular way. An attempt by a judge to ensure release at a particular time in accord with his expectations at the time of sentencing thus usurps the authority Congress gave to the Commission and defeats the objectives of placing the release decision in a separate body.

2. The Third Circuit also reasoned that the Commission had imposed a "double punishment" because both the Commission and the sentencing judge took account of offense severity in determining how long the prisoners should serve. The court reasoned that, once a judge had given an especially substantial sentence because of the severity of the offense, the Commission could not deny release on the basis of the same considerations.

But these cases involve only one punishment—the sentence imposed by the district court. No matter what factors the Commission may consider, it cannot require a prisoner to serve more than the maximum selected by the Judicial Branch. Unless the Third Circuit meant to prohibit the Commission from thinking about anything that may have influenced the length of the sentence, this argument reduces to the observation that courts may not perfectly anticipate or be able to control the Commission's release decisions. And there is no basis for prohibiting the Commission from considering things that may have influenced the length of the sentence. Both the courts and the Commission may consider any relevant factor.

3. The Third Circuit also may have concluded that a parole hearing is not "meaningful" unless it gives dominant roles to rehabilitation and institutional conduct, and that judges may reduce their sentences in response to the lack of "meaningful" consideration of those factors. But the meaning of a parole hearing lies in the application of established rules to particular facts. A court cannot, under the rubric of ensuring a meaningful hearing, control the content of the rules that the Commission applies. The Commission possesses ample statutory authority to take factors other than rehabilitation into account when making release decisions.

C

Even if the Third Circuit were correct in concluding that sentencing judges may have legitimate expectations about the Parole Commission's decisions, it would not follow that courts are entitled to revise their sentences on collateral attack when parole decisions disappoint their expectations. This Court has repeatedly held that courts may not reduce a sentence once its service has begun. Fed. R. Crim. P. 35 modifies that rule, but only during the first 120 days after a sentence has become final.

Given the fundamental principle that courts do not have a continuing authority to revise sentences, the Third Circuit was wrong in concluding that 28 U.S.C. 2255 supplies a residual source of judicial authority to resentence defendants in response to parole decisions. Although Section 2255 permits courts to vacate

sentences that are "subject to collateral attack," that provision applies only when the trial or sentence is infected by a fundamental error that results in a complete miscarriage of justice. A sentencing judge's mistaken assumption about the way in which the Commission would exercise its discretion is not such a defect. The sentences here were lawful when imposed, and the Commission's decision that the defendants must serve their full sentences (less good time credits) does not expose them to collateral attack. Service of a lawful sentence simply is not a complete miscarriage of justice.

D

Much of the Third Circuit's rationale was influenced by its belief that the Commission radically changed its practices after the defendants were sentenced. That belief is incorrect.

The Commission has never had a presumption in favor of release after service of one-third of the maximum sentence imposed by the court. The Commission's public statements consistently emphasized the weight it gave to the seriousness of the offense and considerations of deterrence. The governing statutes always have permitted the Commission to consider offense severity. Indeed, scholars who studied the Commission's decisions during the years the defendants here were sentenced found that offense severity was one of the most important factors in explaining release decisions. During 1970 only 42.2% of prisoners with good institutional records were released at or soon after the one-third point. Any rule based on the

belief that until 1973 the Commission did not give substantial weight to the nature and circumstances of the offense thus cannot stand.

ARGUMENT

A DISTRICT COURT MAY NOT REVISE A SENTENCE ON COLLATERAL ATTACK SIMPLY BECAUSE THE PAROLE COMMISSION'S POLICIES, OR ITS DECISION IN A PARTICULAR CASE, "FRUSTRATE THE JUDGE'S SENTENCING EXPECTATIONS"

This case involves questions about the allocation of authority to determine how long a convicted prisoner remains in jail. We therefore first describe the sentencing options available to a sentencing judge, the statutory provisions governing release, and the recent changes in the Parole Commission's approach to its task. We then turn to the question whether these changes, or a decision in a particular case, entitle a sentencing judge to impose a new sentence in order to control more precisely the amount of time a prisoner serves before release.

A. The Sentencing And Parole Release Systems

A district judge has numerous options when sentencing a defendant who has been convicted of a crime. A number of these options depend on the mental condition, age, or drug addiction of the defendant,[10] but the three options most commonly used

[10] See, for example, 18 U.S.C. 4205(c) (commitment for psychological study), 18 U.S.C. 4216 (offenders 22 to 25 years old at the time of conviction), 18 U.S.C. 4251-4255 (narcotic addicts), 18 U.S.C. 5005-5026 (offender less than 22 years old at the time of conviction), 18 U.S.C. 5031-5042 (juvenile delinquents).

are specified by 18 U.S.C. 4205(a) and (b).[11] A sentence under Section 4205(a) requires the prisoner to serve one-third of the maximum sentence imposed before becoming eligible for parole.[12] A court may elect to impose sentence under Section 4205(b)(2), in which event the prisoner "may be released on parole at such time as the [Parole] Commission may determine." Or a court may designate, under Section 4205(b)(1), a minimum term of imprisonment that will establish parole eligibility somewhere between the beginning of the sentence and one-third of the maximum.

Courts may suspend any sentence they impose and place the defendant on probation for a period that does not exceed five years. 18 U.S.C. 3651. A court may not, however, split a lengthy sentence between imprisonment and probation in a way that dictates the amount of time the prisoner spends in prison.

[11] The provisions of Section 4205 are a recodification of 18 U.S.C. (1970 ed.) 4202 and 4208 accomplished by the Parole Commission and Reorganization Act, Pub. L. 94-233, 90 Stat. 219-231. Former Sections 4202, 4208(a)(1), and 4208(a)(2) are recodified at 18 U.S.C. 4205(a), 4205(b)(1) and 4205(b)(2), respectively. The Act also renamed the Board of Parole as the Parole Commission. For purposes of clarity, this brief uses both the numbering system and the terminology of the present statute, regardless of the numbering system and terminology in effect at the time particular events took place.

[12] If the sentence is more than 30 years, the prisoner is eligible for parole after serving 10 years.

Probation may not be combined with a sentence entailing incarceration of more than six months (Section 3651 ¶ 2).

A prisoner is entitled to be released at the expiration of his maximum sentence, less "good time" computed according to 18 U.S.C. 4161. Good time can be as much as one-third of the sentence, but more commonly it amounts to approximately one-quarter of the sentence. Such prisoners are released "as if on parole" and come under the supervision of the Commission on release. A prisoner also acquires an expectation of release slightly before the point established by accumulated good time. Under 18 U.S.C. 4206(d) any prisoner sentenced to more than five years' imprisonment "shall be released on parole after having served two-thirds of each consecutive term" or 30 years, whichever is first, unless the Commission determines that the prisoner "has seriously or frequently violated institutional rules" or that there is a "reasonable probability" that the prisoner would commit further crimes.

During the period between the prisoner's first eligibility for parole and the two-thirds point, the Commission has substantial discretion to decide whether to grant release on parole. 18 U.S.C. 4206(a).[13] Under 18 U.S.C. (1970 ed.) 4203, which was in effect when respondents were sentenced, the

[13] See S. Conf. Rep. No. 94-648, 94th Cong., 2d Sess. 25 (1976); H.R. Conf. Rep. No. 94-838, 94th Cong., 2d Sess. 25 (1976).

Commission was entitled to consider the risk of recidivism and any other aspect of the public welfare in making its decision.[14] Under the present statute the Commission must consider the risk of recidivism and whether "release would * * * depreciate the seriousness of [the] offense or promote disrespect for the law," standards that give the Commission ample if not unlimited discretion. Courts have recognized that the Commission's discretion, even under the new statute, is all but absolute. See, *e.g.*, *Rifai* v. *United States Parole Commission*, 586 F.2d 695 (9th Cir. 1978); *Best* v. *Ciccone*, 371 F.2d 981 (8th Cir. 1967).

Until 1970 the Commission exercised its discretion case by case, using few published criteria. In response to widespread criticism that this led to arbitrary and erratic decisions,[15] the Commission, in co-

[14] 18 U.S.C. (1970 ed.) 4203 provided:

> If it appears to the Board of Parole * * * that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole.

[15] Both the federal and state parole boards had been criticized severely for the failure to adopt formal standards for parole decision making. A report of the National Advisory Commission on Criminal Justice Standards and Goals summarized this shortcoming as follows:

> The absence of written criteria by which decisions are made constitutes a major failing in virtually every parole jurisdiction. Some agencies issue statements purporting to be criteria, but they usually are so general as to be meaningless. The sound use of discretion and ultimate

operation with the Research Centers of the National Council on Crime and Delinquency, undertook an analysis of its previous decisions in order to identify the policies and release criteria implicit in those decisions. These studies showed that in making parole decisions the primary concerns were severity of offense, parole prognosis, and institutional behavior, and that a fairly accurate prediction of the Commission's

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accountability rest largely in making visible the criteria used in forming judgments. Parole Boards must free themselves from total concern with case-by-case decision making and attend to articulation of the actual policies that govern the decision making process.

National Advisory Commission on Criminal Justice Standards and Goals, *Task Force Report: Corrections* 418 (1973). See also N. Morris, *The Future of Imprisonment* 24-43 (1974); D. Stanley, *Prisoners Among Us: The Problem of Parole* 50-66 (1976); A. von Hirsch & K. Hanrahan, *Abolish Parole?* 7-14 (1978).

The federal Parole Board in particular was sharply criticized for its failure to articulate an explicit paroling policy:

> An outstanding example of completely unstructured discretionary power that can and should be at least partially structured is that of the United States Parole Board. In granting or denying parole, the board makes no attempt to structure its discretionary power through rules, policy statements, or guidelines; it does not structure through statements of findings and reasons; it has no system of precedents * * *.

K. C. Davis, *Discretionary Justice* 126 (1969). A similar suggestion for the adoption of paroling guidelines was made by the Administrative Conference of the United States. See *Administrative Conference Recommendation 72-3: Procedures of the United States Board of Parole (adopted June 9, 1972)*, 2 *Recommendations and Reports of the Administrative Conference of the United States* 58-62 (1973).

parole release decisions could be made by knowledge of the Commission's evaluations of these three factors.[16]

As a result of these studies, the Commission began to experiment with structured release criteria that took into account the factors that figured most prominently in the Commission's past decisions—the nature of the offense and the offender's personal characteristics. It ranked offenses by severity and assigned weights to offender characteristics according to their statistical value as predictors of recidivism. For each combination of offense severity and risk of recidivism, the prisoner and the Parole Commission could find in a table a range (*e.g.*, 36 to 45 months) within which approximately 80 to 85% of the persons with similar characteristics could expect to serve, with good institutional behavior, before release.[17] The research was commenced in 1970, before the defendants[18] here were sentenced. The use of guidelines

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[16] See Gottfredson, Hoffman, Sigler & Wilkins, *Making Paroling Policy Explicit*, 21 Crime and Delinquency 34, 37 (1975). See also the data discussed in Morris, *supra*, and Stanley, *supra*.

[17] For a history of this development and a more detailed description of the system, see Stanley, *supra*; Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 Yale L.J. 810 (1975); Hoffman & DeGostin, *Parole Decision-Making: Structuring Discretion*, 38 Federal Probation 7-15 (December 1975).

[18] For purposes of convenience, we will refer to Addonizio, Bonanno, Whelan and Flaherty as "defendants" or "prisoners."

was initiated on a trial basis in one region in 1972 and was significantly revised and extended throughout the nation in November 1973 (38 Fed. Reg. 31942).[19] The present guidelines are codified at 28 C.F.R. 2.20. The Commission now is required by statute to maintain a guideline system. 18 U.S.C. 4203(a)(1) and 4206(a).[20]

The guidelines thus are "the result of an effort to introduce more consistency in parole decision-making" (*United States* v. *DiRusso*, 535 F.2d 673, 674 (1st Cir. 1976)), and they serve this function principally by enabling the Commisioners to announce—to the Commission's hearing examiners especially—how the Commission exercises the discretion given it by statute. As the Conference Committee stated in recommending enactment of the current statute, "the parole authority must have in mind some notion of the appropriate range of time for an offense," and the "use of guidelines * * * will sharpen this process and improve the likelihood of good decisions." S. Conf. Rep. No. 94-648, 94th Cong., 2d Sess. 19 (1976). The guidelines are not inflexible. They establish broad ranges of confinement for persons with good institutional behavior. Institutional offenses or

[19] The 1972 experiment in the Commission's northeast region (which includes New Jersey) involved a table of factors and the computation of guideline release ranges similar to those in use today.

[20] The guidelines are subject to periodic study and revision. See 42 Fed. Reg. 39808 (1977). See also S. Conf. Rep. No. 94-648, *supra*, at 27.

extraordinarily good behavior will justify a decision outside the ranges. Unusual circumstances related to the severity of the offense also will cause a departure from the guidelines.[21] And the Commission has generally reserved the privilege to depart from the guidelines whenever it concludes that circumstances warrant. 28 C.F.R. 2.18, 2.20(c).

B. The Statutes Give To The Commission Full Authority To Determine The Actual Length Of Imprisonment

The system of sentencing and parole release we have described allocates to judges the authority to select a maximum sentence from among those authorized by Congress and, within limits, to set the date on which the prisoner will become eligible for parole. But Congress has established important restrictions on the power of courts to prescribe the actual amount of time that any prisoner serves. A court cannot set a parole eligibility date that is more than one-third of the maximum term it imposes. When it imposes a "split" sentence (both imprisonment and probation), the length of imprisonment

[21] 18 U.S.C. 4206(c) allows the Commission to grant or deny release on parole notwithstanding the guidelines if it determines there are good reasons for so doing, provided the Commission gives the prisoner written notification stating the reasons and information relied on. Factors suggested by Congress as justifying a parole release determination above the guidelines were "whether or not the prisoner was involved in an offense with an unusual degree of sophistication or planning, or has a lengthy [prison] record, or was part of a large scale conspiracy or continuing criminal enterprise." S. Conf. Rep. No. 94-648, *supra*, at 27; H.R. Conf. Rep. No. 94-838, *supra*, at 27.

cannot exceed six months. A court has authority to modify its sentence during the first 120 days after it becomes final, but that time cannot be extended. Fed. R. Crim. P. 35, 45(b). This system of powers and restrictions gives to the Parole Commission the authority to set a release date somewhere between the earliest eligibility for release and the date of mandatory release established by the maximum term less good time credits. See generally *United States* v. *Grayson*, No. 76-1572 (June 26, 1978), slip op. 6.

There are good reasons for this allocation of authority. After fixing a sentence "the judge becomes progressively less familiar with the considerations material to the adjustment of the punishment to fit the criminal. At the same time, the officials of the Executive Branch responsible for these matters become progressively better qualified to make the proper adjustments." *Affronti* v. *United States*, 350 U.S. 79, 84 n.13 (1955).[22] See also *Moody* v. *Daggett*, 429 U.S. 78, 89 (1976).

The Commission employs penological experts and hearing examiners trained in the field of penology. These personnel can assess the prisoner's character and prospects, make a studied determination based on their experience with thousands of other cases about the appropriate time for release, and conduct periodic review hearings. An independent body of Commissioners can study the parole procedures in

[22] See also *Hearings on H.R. 1598 and identical bills Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 180 (1973) (testimony of Assistant Attorney General Antonin Scalia).

use and change them when appropriate.[23] The Commission acts collectively, so that individualistic reactions to particular facts will not necessarily control the outcome of the cases.

More than that, the establishment of an independent body with the ultimate say on release decisions can reduce the disparity that is associated with sentencing by individual judges, who may give dramatically different sentences to similarly-situated offenders.[24] Individual judges can do little about this problem,[25] and Congress therefore intended that the Commission "balanc[e] differences in sentencing policies and practices between judges and courts in a system that is as wide and diverse as the Federal criminal justice system." S. Conf. Rep. No. 94-648, *supra*, at 19; H.R. Conf. Rep. No. 94-838, *supra*, at 19. See

[23] See 18 U.S.C. 4203(a)(1). The Commission has recognized that the use of guidelines might create an unnecessarily rigid system to replace the unnecessarily chaotic one that preceded it. The Commission therefore has reserved the right to depart from its guidelines in particular cases and to reexamine the guidelines periodically. See 28 C.F.R. 2.20(g). See also Gottfredson, Hoffman, Sigler & Wilkins, *supra*, at 41; S. Conf. Rep. No. 94-648, *supra*, at 27; H.R. Conf. Rep. No. 94-838, *supra*, at 27.

[24] This disparity has been strongly criticized. See, *e.g.*, M. Frankel, *Criminal Sentences: Law Without Order* (1973).

[25] Attempts by district courts to reduce sentencing disparity through consultation, sentencing councils and other devices have not been notably successful. See, *e.g.*, Diamond & Zeisel, *Sentencing Councils: A Study of Sentence Disparity and its Reduction*, 43 U. Chi. L. Rev. 109 (1975). Cf. Zeisel & Diamond, *Search for Sentencing Equity: Sentence Review in Massachusetts and Connecticut*, 1977 A.B.F. Research J. 881.

also S. Rep. No. 94-369, 94th Cong., 1st Sess. 16 (1975).

Given the legislative judgment that an independent administrative agency should make the decision about the length of time any particular prisoner serves, within the outer limits selected by the court, the question presented here becomes "whether, when shaping its sentence, the sentencing court's failure to predict what the parole authorities would do provides any ground" for modifying the sentence. *United States* v. *McBride*, 560 F.2d 7, 11 (1st Cir. 1977). The Third Circuit has given two general reasons for asserting such a power to revise sentences.[26] We discuss them in order.

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[26] The Eighth Circuit also has concluded that courts may revise sentences in response to parole decisions, when the parole decision demonstrates that a prisoner sentenced before November 1973 was denied "meaningful consideration" for release from a sentence imposed under 18 U.S.C. 4205 (b) (2). See *United States* v. *Lacy*, 586 F.ad 1258 (8th Cir. 1978) (en banc). Under the standards of *Lacy* judges in the Eighth Circuit should rarely, if ever, revise a sentence that was lawful when imposed.

The First, Second, Fourth, Sixth, Seventh, and Ninth Circuits have held that courts lack authority to revise sentences in response to parole decisions or changes in parole policies. See *United States* v. *McBride*, *supra*; *United States* v. *DiRusso*, 548 F.2d 372 (1st Cir. 1976); *Thompson* v. *United States*, 536 F.2d 459 (1st Cir. 1976); *United States* v. *DiRusso*, 535 F.2d 673 (1st Cir. 1976); *Dioguardi* v. *United States*, No. 78-2058 (2d Cir. Nov. 15, 1978); *Farmer* v. *United States Parole Commission*, No. 77-2017 (4th Cir. Nov. 29, 1978); *Wright* v. *United States Board of Parole*, 557 F.2d 74 (6th Cir. 1977); *Coil* v. *United States*, Misc. No. 76-8086 (7th Cir. Sept. 17, 1976), cert. denied, 429 U.S. 1050 (1977); *Elliott* v. *United States*, 572 F.2d 238 (9th Cir. 1978); *Andrino* v. *United States Board of Parole*, 550 F.2d 519 (9th Cir. 1976); *Tedder* v. *United States Board of Parole*, 527 F.2d 593, 594 n.1 (9th Cir. 1975). The Fifth Circuit has indicated that it is inclined to follow these six courts if it should be squarely presented with the problem. *United States* v. *Kent*, 563 F.2d 239 (5th Cir. 1977) (sentence imposed after November 1973 may not be reduced despite any frustration of the judge's subjective expectations). A panel of the Fifth Circuit stated in dicta that sentences imposed before that date could be revised (*United States* v. *McIntosh*, 566 F.2d 949 (5th Cir. 1978)), but it later withdrew that opinion (*id.* at 952).

1. The foundation for the Third Circuit's holding is its conclusion that "a sentencing judge's intent and probable expectations should be vindicated to the fullest extent possible" (78-156 Pet. App. 8a). The court derived this principle from the fact that district judges have almost complete power over the maximum sentence to be served; "it would necessarily follow," the court said, "that the sentencing judge's intentions and expectations as to actual time of incarceration should be vindicated to the greatest extent possible" (*id.* at 9a). The court also thought that it would violate "the integrity of the sentencing court" and offend "concepts of decency and fair play" if the Commission were allowed to require a prisoner to stay in jail for longer than the sentencing judge intended (*ibid.*).

But the conclusions of the Third Circuit do not "necessarily follow" from the premise that judges have substantial control over the maximum sentence to be served. The conclusion that judges must control

the actual amount of time served because they control the maximum is a simple non sequitur. It amounts to nothing other than disagreement with the statutes that commit the release decision to an independent body. Our discussion of the pertinent statutes (see pages 24-31, *supra*) demonstrates that Congress has divided between the courts and the Executive Branch the power to determine how long a prisoner must serve. Courts cannot properly reason that, because they set one of the important dates (the maximum sentence), they must be allowed to set every important date.

It does not help the argument to cast it in terms of an objection to the "frustration" of the court's "intent." That begs the question whether a court properly may have (or do anything about) an "intent" that the prisoner be released by parole officials at any particular time. It is inevitable, moreover, that judges will be "frustrated" from time to time by the Commission's decisions. Unless those decisions sometimes differ from the decisions that the judges would have made (or think should be made) there would be little point in having a Commission. And unless the Commission can disappoint the desires of judges, it cannot fulfill its salutory task of smoothing out the disparities in the sentencing practices of individual judges.

The nature of the legislative plan is most plain in two statutes: the first (18 U.S.C. 4205(b)(1)) explicitly withholding from courts the power to fix a parole eligibility date at more than one-third of the

maximum sentence, and the second (18 U.S.C. 3651) explicitly withholding from courts the power to combine probation with imprisonment exceeding six months. The inference is unescapable that Congress intended to forbid courts to select precise release dates, and in particular to forbid the combination of a judicially-selected release date with a term of post-release supervision (whether on probation or parole). The Third Circuit's decision allows district courts to produce the very combination of precise release date and post-release supervision that the statutes forbid.

Congress' desire to preserve to the Commission alone the authority to set release dates also is demonstrated by the provision of the Parole Commission and Reorganization Act that release decisions shall be deemed "committed to agency discretion," thus precluding review under the Administrative Procedure Act. Compare 18 U.S.C. 4218(d) with 5 U.S.C. 701(a)(2). See also 18 U.S.C. 4207(4), which authorizes sentencing judges to submit to the Commission recommendations concerning parole release; the Commission must "consider," but not necessarily follow, these recommendations.

So long as Congress adheres to its judgment that release decisions should be made by an administrative panel, courts cannot insist that the administrative body exercise its discretion in any particular way. Any attempt by a judge to "vindicate" his personal expectations about the actual amount of time to be served would nullify the legislative plan. As the First Circuit explained in *United States* v. *DiRusso*,

548 F.2d 372, 374-375 (1976): "[T]he division of responsibility between the sentencing court and the Parole Commission would be skewed if a sentence could be vacated whenever the Parole Commission exercised its discretion so that a particular prisoner was to be confined for a substantially longer time than the sentencing judge had contemplated. * * * To permit the district court to revise a sentence whenever the Parole Commission's decision was inconsistent with his intent would divest the Commission of its discretionary power under the law, and defeat the objectives of placing the parole decision in a separate body." [27]

2. The Third Circuit's second principal reason for concluding that courts may revise their sentences stemmed from its belief that the Commission only recently has begun to give substantial importance to the seriousness of the offense, and that it had not previously done so. (We show at pages 50-55, *infra*, that the court's belief about the Commission's prac-

[27] For similar reasons, a court could not resentence a defendant simply because federal prison officials placed him in confinement more onerous than the judge intended or did not provide the prisoner with rehabilitative programs that the judge would have desired. 18 U.S.C. 4081 gives federal prison officials "full discretion to control * * * conditions of confinement" (*Moody* v. *Daggett*, *supra*, 429 U.S. at 88 n.9). A court's belief that a 10-year sentence would be appropriate only if served in a minimum-security prison, and that some other sentence would be appropriate if it were to be served in a maximum-security prison, thus would not authorize a court to alter its sentence if the prisoner should be moved from one prison to another. Cf. *Meachum* v. *Fano*, 427 U.S. 215 (1976).

tices before November 1973 is incorrect.) That meant, the court thought, that the Commission might deny release for the same reasons that the sentencing judge had used to give a "stiff" sentence. In Addonizio's case in particular, the court concluded, the nature of the offense led to an enhanced sentence and to the denial of parole as well.[28] It went on: "Traditional standards of criminal justice reject this apparent double punishment for the same factor—one punishment imposed by the sentencing court, the other by the Parole Commission." 78-156 Pet. App. 16a.

But there is no "double punishment" in any of these cases. There is only one punishment—the sentence imposed by the district court. The court's original sentence establishes the maximum period that the Commission can require any offender to serve, no matter how serious the Commission may believe the crimes to be and no matter how long the Commission believes the offender should serve. The court's concern thus reduces to the "frustration" analysis that we have discussed above—that the Commission's evaluation of factors may cause a defendant to serve

[28] The court of appeals also apparently agreed with Judge Barlow's assessment that "the Parole Commission did not take into consideration [Addonizio's] 'excellent institutional record and a very low likelihood of recidivism' " (78-156 Pet. App. 16a, 29a). There is absolutely no support in the record for a conclusion that the Commission did not consider these factors. Its decision is quite consistent with consideration of them (they are, after all, built into the guidelines) and with a conclusion that another factor, the seriousness and nature of the offenses, outweighed them. See A. 11-14. Cf. *United States* v. *Galoob*, 573 F.2d 1167, 1170 (10th Cir. 1978).

more (or less) time than the judge wanted. If a judge does not accurately predict how much weight the Commission may give to a particular factor (such as the seriousness of the offense), he may not be able to impose a sentence that will result in release at a time certain. Here, for example, Judge Barlow apparently imposed his sentence on the assumption that the Commission would release Addonizio automatically at the end of one-third of the sentence (see 78-156 Pet. App. 28a). Judge Barlow said that he imposed a 10-year sentence because he thought that Addonizio should serve three to four years. Judge Barlow was mistaken about the Commission's practices (see pages 50-55, *infra*). This sort of error is just like any other judicial misapprehension (or change in the Commission's practices) that leads to the "frustration" of the judge's desires, and, for the reasons discussed above, does not authorize the revision of a sentence.

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arings of "meaning." Every case that reaches this
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legal rules that influence and perhaps control the
tcome. In some cases the application of these rules
so clear that there can be only one outcome. But
e existence of these rules does not deprive judicial
oceedings of their "meaning;" the meaning lies in
e ascertainment of the facts and the application of
e rules.[33] The meaning also lies in the content of
e rules themselves. In these cases the Commission
certained the facts and applied its reasoned cri-
ria. The defendants were evaluated by Commis-
ners with open minds; they were not entitled to
aluation by Commissioners with empty minds.[34]

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[33] See *United States* v. *Galoob, supra,* in which a prisoner
ntenced under 18 U.S.C. 4205(b)(2) claimed that he was
nied release without a "meaningful" hearing because the
mmission did not give special weight to his rehabilitation.
e court of appeals stated (573 F.2d at 1170) that "Galoob's
eated assertion that his August 3, 1976 hearing 'was not

Authorize Sentencing Judges Expectations About The Time s Would Release A Particular

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served. The Court reasoned that "it is unlikely that Congress would have found it wise to make [judicial control of the sentence] apply in such a way as to unnecessarily overlap the parole and executive-clemency provisions of the law." 350 U.S. at 83.

After *Murray* and *Affronti* judges were effectively forbidden to modify sentences they had imposed. That rule has been modified by Fed. R. Crim. P. 35, which allows a court to correct an illegal sentence at any time and to reduce a sentence, for any reason, within 120 days after its imposition. This 120-day period, which cannot be extended (see Fed. R. Crim. P. 45 (b)),[35] establishes a line of demarcation between the authority of judges over the length of the sentence and the authority of the Parole Commission over how

[35] The 120-day period is jurisdictional. See *United States* v. *Robinson*, 361 U.S. 220 (1960); *In re United States*, No. 78-1409 (4th Cir. Nov. 29, 1978); *United States* v. *Galoob*, *supra*, 573 F.2d at 1171; *United States* v. *Norton*, 539 F.2d 1082, 1083 (5th Cir. 1976), cert. denied, 429 U.S. 1103 (1977); *United States* v. *Becker*, 536 F.2d 471, 473 (1st Cir. 1976). It is

much shall be served. The Rule necessarily establishes that only the Executive Branch may reduce a lawful sentence after the expiration of the 120 days.[36] Indeed, "the time limitation [under Rule 35] appears to have as its dual purpose the protection of the district court from continuing and successive importunities and to assure that the district court's power to reduce a sentence will not be misused as a substitute for the consideration of parole * * *." *United States* v. *Stollings*, 516 F.2d 1287, 1289 (4th Cir. 1975).

Given the principles of *Affronti* and *Murray*, and the limits on the sentence revision power granted by Rule 35, the Third Circuit was wrong in concluding that 28 U.S.C. 2255 supplies a residual source of judicial authority to resentence a defendant in response to parole decisions. Although Section 2255 allows courts to vacate sentences that are "subject to collateral attack," this provision is not a catch-all that authorizes courts to do whatever they believe is in the interests of justice. "[T]he appropriate inquiry [is] whether the claimed error of law [is] 'a funda-

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(1972)).[37]

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[37] In *Townsend* the
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Here the judges at most erred in predict
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it possessed.

The sentences in these cases were wel
statutory limits. They authorized confi
their expiration, giving the Executive
custody. Cf. *Meachum* v. *Fano*, 427 U.S.
The decision by the Parole Commission
fendants must continue to serve these la
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United States. A decision by the Parole
not to release a prisoner in circumstanc
presented here thus does not make a sente
to collateral attack." [39] Service of a law

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sentences in response to unanticipated parole
rules, it relied on this line of cases. This reli
taken. As the Fourth Circuit, which decided *Le*
in refusing to follow *Kortness* and the other c
Third and Eighth Circuits, those courts misund
"The question for decision in *Lewis* involved the
§ 2255 of a sentence 'imposed under a misappreh
* * *' which had nothing to do with any act

d after a fair trial simply is not a "complete
riage of justice" that authorizes collateral at-

unfortunate, but true, that a court must im-
ntence without perfect knowledge of the de-
and everything that will happen under the
e. A court may impose a sentence because it
the defendant to be particularly culpable; if
ge were to become persuaded five years later
e defendant was not so culpable as the judge
ught, this would not authorize the judge to im-
new sentence. If it did, judges would sit as
ng sentence review bodies, serving the same
the Parole Commission, and there would be

605, 611 n.6 (1973); and *Morrissey* v. *Brewer*,
471, 480 (1972). Although we agree with the
Circuit that parole release decisions are not part
iminal trial and sentence—see our brief as *amicus*
Greenholtz v. *Inmates*, No. 78-201, argued Jan. 17,
believe that the approach taken in the text is pre-
The Second Circuit's analysis does ch

incompatible with the welfare of society * * *." [45] Parole was never mandatory, and no one should have thought that the two statutory criteria both dealt solely with rehabilitation and not at all with principles of deterrence and desert. As one district judge explained: "When Congress permitted the [Commission] to consider the welfare of society after determining whether the prisoner was likely to be law-abiding upon release, it did not preclude the [Commission's] consideration of general deterrence, the concern that an early release of one charged with a serious offense might lessen the deterrent effect upon others contemplating the same offense." *Battle* v. *Norton*, 365 F. Supp. 925, 931 (D. Conn. 1973).

The study we have discussed at pages 27-29 & n.16, *supra*, showed that before 1972 the nature of the offense was one of the three factors that best explained release decisions.[46] Moreover, a sample of the parole

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[45] The language of 18 U.S.C. (1970 ed.) 4203(a) was almost identical to that of the 1910 statute (Act of June 25, 1910, 36

2. The Third Circuit did not
4205(a) requires the Commissio
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Circuit has concluded that diffe
tences under Section 4205(a) and
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supra*). But the data show that
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soners sentenced under Section 42
47, *supra*).[48] Moreover, the leg

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release. Of those in this group who wer

ection 4205(b)(2) shows that Congress neither in-
nded nor envisioned that the criteria for release
parole of prisoners sentenced under this provision
ould be any different from those used for determin-
g the release of prisoners sentenced under Section
05(a).

Congress' principal purpose in enacting Section
05(b)(2) was to provide a practicable method for
ioothing out the widespread disparities that char-
terized sentences imposed by federal judges. Con-
ess believed that unequal punishment for prisoners
th similar backgrounds who had been convicted of
entical offenses cast doubt on the evenhandedness of
stice and encouraged disrespect for the law. S. Rep.
. 2013, 85th Cong., 2d Ses. 5 (1958); H.R. Rep.
. 1946, 85th Cong., 2d Sess. 6 (1958). The inde-
minate sentencing provision of Section 4205(b)
), Congress felt, would permit the courts to share
th the Executive Branch the responsibility for de-
mining the minimum length of a prisoner's con-

de "the chief means by which
xecutive branch [could] co-
t the public by formulating
t more fully the purposes of
, and reformation." S. Rep.
H.R. Rep. No. 2579, 85th
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. 2013, *supra*, at 5. See also
ra, at 3.[49]
lines by the Commission in
criteria to the parole de-
he guidelines instead estab-
s for the consistent evalua-
s and personal backgrounds
y ranges of time that ordin-
y persons with good insti-
rious combinations of those

existing law. S. Rep. No. 94-369, 94th Cong., 1st Sess. 18 (1975). See also *Hearings on S. 1463, S. 119 to Amend Parole Legislation Before the Subcomm. on National Penitentiaries of the Senate Comm. on the Judiciary*, 93d Cong., 1st and 2d Sess. (1973-1974), 94th Cong., 1st Sess. (1975) 123 (letter of Sen. McClellan).[50]

As it happens, the guidelines ultimately did not affect the present cases; all four defendants were held longer than the time that the guidelines indicate is customary. All four were denied release because the Commission determined, after thorough attention to their particular crimes, that they were not ordinary criminals (A. 11-14, 60-61, 66-67, 75-79). Even if the

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[50] See also 121 Cong. Rec. 15702 (1975) ("we do not weaken or change or liberalize the standards applied by the Commission whether or not the individual is released") (remarks of Rep. Kastenmeier, Chairman of the responsible subcommittee); 121 Cong. Rec. 15710 (1975) ("[T]he standards which the [Commission] will be applying if this bill is enacted, will be identical to the standards which the [Commission] relies on now. They will look at a prospective parolee's

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OCTOBER TERM, 1978

~~77-1865 and~~ 78-156

CHARLES BONANNO, JR.,

Petitioner

v.

STATES OF AMERICA

STATES OF AMERICA,

Petitioner

v.

GH J. ADDONIZIO

STATES OF AMERICA,

Petitioner

v.

LAN and THOMAS M. FLAHERTY

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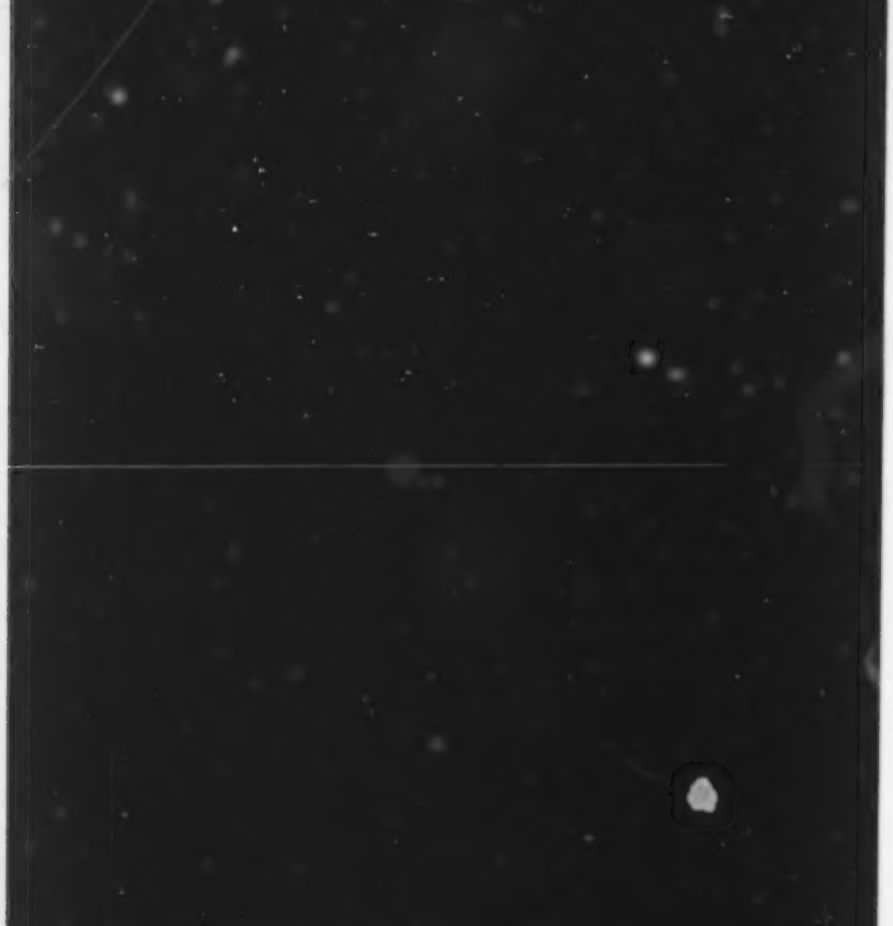
Regulation Cited

Other Authorities Cited



IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 77-1665 and 78-156

JOSEPH CHARLES BONANNO, JR.,

Petitioner

v.

UNITED STATES OF AMERICA

UNITED STATES OF AMERICA,

Petitioner

v.

HUGH J. ADDONIZIO

UNITED STATES OF AMERICA

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g Court had jurisdiction pursuant
5 motion to vacate and correct a
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, has been changed to defendant's
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tatement

Procedural Background of Hugh J. Addonizio

ntenced in September 1970 to a
years pursuant to Title 18 U.S.C.
ary fine in the amount of $25,000.
for parole on July 3, 1975 after
of his term. On June 2, 1975, an
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the hearing, the hearing officers
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the hearing officers, Mr. Addonizio was advised that the officers declined to rule on his parole application and that the matter was being referred to the Regional Office of the Parole Board in Philadelphia. Thereafter, Mr. Addonizio was advised that the Regional Board had further declined to make a ruling and the application had been sent to the National Board in Washington. On July 8, 1975, three members of the National Board in Washington denied Mr. Addonizio's application and set January 1, 1977 as his next eligibility date (A. 38-39). The reasons given for the denial were:

> "After careful consideration of all relevant factors and information presented, it is found that a decision outside the guidelines at this consideration appears warranted because the offense was part of a large scale or organized criminal conspiracy. Further, the offense behavior consisted of multiple separate offenses." (A. 13)

After the denial of his parole application, Mr. Addonizio was advised that a designation of "special offender" on his file had made the salient factor quotient and the Parole Board guidelines inapplicable to his case (A. 39)[1]. He had previously been advised that the same designation had

As a result, Mr. Addonizio filed a petition for habeas corpus in the jurisdiction of incarceration seeking the removal of the "special offender" designation based upon *Catalano* v. *United States,* 383 F. Supp. 346 (D. Ct. 1974). On May 3, 1976, the District Court for the Middle District of Pennsylvania ordered the "special offender" designation removed from Mr. Addonizio's records. At the same time the court found that the designation had not resulted in the denial of parole; but rather, that parole had been denied based upon the Board's evaluation of Mr. Addonizio's offense. The court further permitted Mr. Addonizio to be classified as a "central monitoring case" in accordance with new Parole Board procedures. *U.S. Ex Rel. Addonizio* v. *Arnold,* 423 F. Supp. 189 (M.D. Pa. 1976)

On December 8, 1976, a second institutional hearing was held by two hearing officers of the Parole Commission. This hearing was an extremely short one. The hearing officers did not question Mr. Addonizio or have any discussion with him in an effort to evaluate his progress and rehabilitation or his prospects for successful reintegration into society in the event parole was granted. They now advised him that they had no authority to grant his application since he was designated a "central monitoring case". They further told him that with him it was not a question

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[3] By that time *Kor*
1976) and *U. S.* v.

Mr. Addonizio had served five years and
his ten year sentence. The court, based upo
of the Third Circuit cases of *United States*
F. 2d 1005, rehearing denied, 542 F. 2d 628
and *United States* v. *Somers*, 552 F. 2d 108
found it had jurisdiction under 28 U.S.C.
its reasonable intention and expectations
sentencing had been frustrated by the new p
making standards and procedures adopted
sentencing.

Mr. Addonizio was a first offender. At t
conviction he had been serving his second t
of the City of Newark. Prior thereto he
guished record of public service, including
as a member of Congress and had been a hi
World War II veteran. Mr. Addonizio wa
at the time of sentencing and is now 64 (A. 5

The court specifically stated that it had
sidered the severity of respondent's crime
the harsh ten year sentence and had expect
to receive "a meaningful parole hearing—th
mination based on his institutional record

edures not in existence and not contemplated at of sentence.[5]

donizio was released from prison on April 28, uant to the District Court's order of the preced- He was reincarcerated pending appeal on May 3, rder of the Third Circuit and then re-released 2, 1977 by order of this Court.

not forming the basis of the District Court's finding of and ruling, the District Court added that it felt "the icial conscience" demanded its ruling. In a footnote, the ed out that one of Mr. Addonizio's co-defendants, who ecisely the same sentence as Mr. Addonizio, was released n March 1976, after having served four years—slightly one-third of his ten year sentence (78-156 Pet. App. 32a). noted further that a second co-defendant, also with the ce was released on parole in early April 1976 (A. 41-43). , the District Court was undoubtedly mindful of the fact original fifteen defendants named in the indictment, only ed on trial as of the close of the government's case.

The Third Circuit was presented with a series of cases including the instant case, and *Geraghty* v. *U.S. Parole Commission,* 579 F. 2d 238 (3rd Cir. 1978) which required it to make a thorough and careful analysis of parole decisionmaking practice and procedure before and after the 1972-3 changes and the PCRA. As a result the Third Circuit developed a full understanding of the fundamental nature of the change and its adverse impact on certain defendants sentenced prior to 1972-3. It is this understanding which led to the proper determination, entirely consistent with current case law, of the need for, and availability of; a remedy under §2255.

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The underlying philosophy of par
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The amendments to the Parole
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this issue, Senate Report No. 524 co

degree of rehabilitation that would warrant the parole of a prisoner. (Emphasis added) 1951 U.S. Code Cong. Service, pages 1676-1677.

A letter attached to the report from the Justice Department recommending passage of the amendment states:

> "There have been numerous cases of prisoners who have learned their lesson, have made an outstanding response to the prison rehabilitation program, and would, in all probability have made good law abiding citizens if released at the proper time, but, as a result of the delay in effecting their release until one-third of their sentences had been served became poor parole risks at the time their eligibility date arrived." Id. at 1678.

In 1958 in its discussions of what became Title 18 U.S.C. 4208(a)(1) and 4208(a)(2), [now 4205(b)(1) and (b)(2)], which permitted consideration for parole prior to the one-third point of the sentence, it is again clear that Congress was operating under the assumption that decisions to grant parole would be based upon the Board's assessment of rehabilitation as gleaned from institutional performance.[12]

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While in 1970, as today, there were three major sentencing alternatives available to the courts,[13] the choice of sentencing alternative affected only the timing of eligility for parole and not the criteria used in the decision making process. *Tedder* v. *Bd. of Parole,* 527 F. 2d 593, 594 (9th Cir. 1975); *United States* v. *McBride,* 560 F. 2d 7, 9-10 (1st Cir. 1977); *Dioguardi* v. *United States,* 587 F. 2d 572 (2nd Cir. 1978); *Ruip* v. *United States,* 555 F. 2d 1331 (6th Cir. 1977); *Geraghty* v. *United States Parole Commission,* 579 F. 2d 238 (3rd Cir. 1978).

The only statutory provision in 1970 dealing with the criteria used in parole decisionmaking was 18 U.S.C. 4203 which provided:

> "If it appears to the Board of Parole from a report by the proper institutional officers or upon application by a prisoner eligible for release on parole, that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole."

Section 4202 of Title 18, dealing with a sentence of a

in which he is confined, may be released on parole after serving one-third of such term or terms or after serving fifteen years of a life sentence or of a sentence of over forty-five years."

B. Subsequent to the imposition of Mr. Addonizio's sentence there was a radical change in the criteria applied in parole decisionmaking.

The criteria used in parole decisionmaking were radically changed first by the Parole Board in 1972-73 and then confirmed by the enactment of the Parole Commission and Reorganization Act of 1976. The present §4206 (a) of Title 18 provides:

> "If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, *and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner determines*:
>
> (1) *That release would not depreciate the seriousness of his offense or promote disrespect for the law; and*

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(1976); H. R. Conf. Rep. No. 94-838, supra, 25-
(1976).[16]

overnment asserts that, "In enacting the Parole
ion and Reorganization Act, which endorsed the
ion's use of the guideline and required continued
nat device, Congress emphasized that the stand-
release on parole were not being changed from
law." (GB 58-59). One need only to examine with
citations set forth by the government in support
proposition to conclude that the opposite of the
ent's contention is true. The govermnent's cita-
particularly those appearing and quoted in Foot-
(GB 59) are not directed at the Parole Commis-
Reorganization Act as passed and signed into
rather were directed to H.R. 5727, the House of
tatives ancestor of the PCRA. The relevant

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her Congress was wise in inserting these considerations
for parole decisionmaking is not relevant to the question
by this case. That these were new considerations applied
e Parole Commission in its pilot project in 1972 and then
in 1976 by the PCRA is, however, clear. "The guide-
thus represents two major departures in previous parole
ecisionmaking. It establishes explicit criteria which, in
determine the parole release date. And in its choice of

Finding that the new guidelines had frustrated the intentions and expectations of the sentencing judge at the time of imposition of sentence, the court held that Title 28 U.S.C. §2255 provided an appropriate vehicle for granting relief.

In denying rehearing, the Third Circuit made the limitations of its *Salerno* ruling clear; stating:

> "Our holding is narrow and does not vest sentencing courts, as alleged by petitioner, 'with power of a super parole board'. Our decision does, however, 'permit the district court to correct a sentencing error where the import of the judge's sentence has in fact been changed by guidelines adopted by the Parole Board . . . subsequent to the imposition of that sentence.' *United States* v. *White,* 540 F. 2d 409, at 411 (8th Cir. 1976)"[19]

We suggest that the court could have as correctly stated: "While our holding does not vest sentencing courts 'with the power of a super parole board', the

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[19] Concerned about the impact of its ruling on judicial time the Court made the following observation in the original *Salerno* opin-

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1976); Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 219 (1976) [codified in 18 U.S.C. §4201 et seq. (Supp. 1977)]. For example, in addition to consideration of the institutional record and the probability of recidivism, there now seems to be a very much heightened emphasis on 'the nature and circumstances of the offense.' See, e.g. 28 C.F.R. §2.18 (1976). Compare 28 C.F.R. §2.2 (1971); note 3 supra.

It is clear that this new emphasis has had a substantial adverse impact on the petitioner's eligibility for parole. He has now served more than one-half of his ten-year sentence and has twice been denied parole, despite his excellent institutional record and a very low likelihood of recidivism. Both denials were predicated primarily on the nature and circumstances of the petitioner's offense. See United States ex rel. Addonizio v. Arnold, 423 F. Supp. 189, 190 n.4 (M.D. Pa. 1976); Supplemental Brief for Petitioner, Exhibit A.

Thus, it is obvious that the petitioner has not received the type of meaningful parole hearing contemplated by the Court at the time of sentencing.

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] prisoners were not released until well
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ke no account of the fact that even in-
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e exact one-third point because of the
nd most importantly, they contradict the
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standing of the effect of the sentence

The rule of the Third Circuit remains as set forth in the second *Salerno* opinion and permits "the district court to correct a sentencing error where the import of the judge's sentence has in fact been changed by guidelines adopted by the Parole Board . . . subsequent to the imposition of that sentence"[23] as may be modified only by the greater understanding the Third Circuit has acquired since the *Salerno* case of the extent of the change actually effectuated in parole decisionmaking criteria and procedures.[24]

Since the *Salerno* and *Addonizio* decisions, the Third Circuit has thoroughly analyzed the fundamental change in parole philosophy and criteria applied in parole decisionmaking. *Geraghty* v. *U. S. Parole Commission,* 579 F. 2d 238 (1978), petition for cert. pending No. 78-572. We submit that the principle of the Third Circuit §2255 cases applies only in the event of such a fundamental change in policy; which change in policy in turn changes the import of the sentence to the detriment of the defendant. We further submit that it is fair to say that in the 69 years since the federal government has had parole legislation, the change which gave rise to the Third Circuit cases is the first and only such fundamental change in philosophy and criteria of federal parole decisionmaking. Cf. 121 Cong.

Rec. 15701 (1975); see, generally, Project, *Parole Release Decisionmaking and the Sentencing Process,* supra.[25]

D. Based upon the change in parole decisionmaking criteria and its effect on the Addonizio sentence, §2255 relief was appropriate.

The scope of §2255 relief is identical to that of habeas corpus. *Davis* v. *U. S.,* 417 U.S. 333, 343 (1974); *Hill* v. *U. S.,* 368 U.S. 424 (1962); *U. S.* v. *Hayman,* 342 U.S. 205 (1952). We respectfully submit that the Ninth Circuit in *Andrino* v. *U. S. Board of Parole,* 550 F. 2d 519 (1977) was in error in denying §2255 relief on the ground that §2241 provided the appropriate remedy.

We respectfully submit that other circuits declining to exercise §2255 jurisdiction in circumstances similar to those presented by the Addonizio case did so from a lack of full understanding of the nature and scope of the changes which took place. The concerns expressed by the First, Second and Sixth Circuits that a decision finding §2255 jurisdiction would mean authority to vacate and re-

[25] This is not to say that the extreme formulation of the "re-

sentence each time well founded.[26]

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in the parole decision-making process which occurred in 1973 and the prior unanticipated affect on sentences imposed prior to that time.

The rule of the Third Circuit has no application to sentences imposed subsequent to the Fall of 1973. The rule, therefore, is narrow, and seeks only to protect the integrity of determinations made by the Judicial Branch prior to the imposition of Federal guidelines for parole consideration in 1973.

The role of the Judicial Branch in pronouncing sentence upon a convicted felon is, perhaps, one of the most important and expedient duties of the Court. Numerous factors are taken into consideration before sentence is pronounced including the Court's understanding as to the type of meaningful parole consideration the individual will receive. The promulgation of new guidelines which occurred in 1973 established a new criteria which prior sentencing courts were totally unapprised of nor could reasonably forsee. This change in criteria thwarted the role of the Judicial Branch. Should this Court prevent judicial intervention in the instant case, it shall have succeeded in critically disturbing the delicate balance of power which exists between these two branches by reason of the decision of the Third Circuit below.

CONCLUSION

By reason of the foregoing, this Court should determine that a Sentencing Court has jurisdiction pursuant to the post-sentencing relief of 28 U.S.C. §2255 upon a showing that the Sentencing Judge's expectations were frustrated by the subsequent changes in criteria considered by the Parole Commission granting or denying relief, which changes fundamentally altered the criteria applied in parole decision-making process employed by the Parole Commission.

Dated: White Plains, New York
February 26, 1979

Respectfully submitted,

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Thomas J. Flaherty

LEON J. GREENSPAN
JOSEPH D. DeSALVO

Of Counsel.

FOR ARGUMENT

No. 78-156

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

HUGH J. ADDONIZIO

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS J. WHELAN AND THOMAS M. FLAHERTY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The principal argument of our opening brief was that, whether or not the Parole Commission has changed the way in which it evaluates applications for release, the decision to have one set of principles for evaluation rather than another has been committed by Congress to the Commission, and that judges therefore cannot revise sentences when the Commission changes its approach or when judges are surprised to learn how the Commission has applied its approach to a particular case. The briefs of respondents and amicus do not come to grips with our reasoning: they argue, in the main, that because the Commission has changed its approach, it must follow that

district judges can change their sentences. We believe that our opening brief establishes that respondents' conclusion does not follow from their premise. It is important, nonetheless, to understand that respondents' premise is itself unfounded.

Our opening brief describes the sentencing and parole release system, the changes that took place in 1973, and the fact that the implementation of a guideline system was intended to produce greater consistency in decision making rather than to introduce new substantive criteria (Br. 24-31, 50-55). Our brief buttressed the submission that the Commission had been evaluating the seriousness of the offense long before 1973 by describing statistics, gathered by the staff of the National Commission on Crime and Delinquency between 1969 and 1972, which show that less than half of first offenders with satisfactory prison records were released at or soon after the completion of one-third of their sentences (Br. 55 n.47). Indeed 29.9% of all first offenders sentenced under what is now 18 U.S.C. 4205(a) were not released on parole at all but were held until mandatory release. The fact that the Commission chose not to release respondents at the one-third point therefore is not unusual, and it would not have been unusual in 1970 or 1972, when respondents were sentenced.

Respondent Addonizio offers principally an anecdotal response to this: he argues, essentially, that "everyone knows" that well-behaved prisoners were released automatically at the expiration of one-third of their sentences. The simple answer is that the Commission was not responsible for any such impression, if it existed. Both by word (see pages 51-58 & nn.42, 43 of our opening brief) and deed (*id.* at n.47) the Commission let bench and bar know that release was far from automatic and that the nature of the offense was taken into account. If some judges did not know this—and if defense counsel did not let judges know—they have themselves rather than the

Commission to blame. As we argued in our opening brief, judicial surprise when the effect of the Commission's policies is felt in a particular case is not a sufficient reason to revise a lawful sentence.

Respondent Addonizio buttresses his anecdotal approach with statistics that, he maintains (Br. 30 n.22), refute the data contained in note 47 of our brief. He makes four arguments, which we address in turn.

Addonizio first argues that the data should be disregarded because they were not available at the time Addonizio was sentenced. This misses the point. We offered the data simply to show that, at the time respondents were sentenced, there was no rule of presumptive release at the one-third point; consequently the absence of such a rule in the Commission's current practice is not a radical change. That point does not depend on the fact that the data did not become available until after respondents' sentences were imposed.

Second, respondent states that the data in note 47 misleadingly encompass the entire federal prison population. Because prisoners with short sentences routinely were held until expiration, Addonizio maintains, the aggregate data overstate the degree to which prisoners with long sentences were denied release on parole. This retort may be based on the lack of a full explanation of the data provided in our brief. In fact, the data refer only to persons with sentences of one year or more; prisoners with truly short sentences were excluded from the compilations. At all events, respondent's submission concedes part of our point: many prisoners were held after the one-third point and were not routinely released.

Third, respondent argues that the figures do not take into account the fact that some prisoners were released shortly after the one-third point, and so they understate the proportion of prisoners granted early release. Here, too, the lack of full description in the footnote may have

caused a misimpression. The National Commission on Crime and Delinquency's figures treat any prisoner who was released within two months of the one-third point as having been released "at" the one-third point. The data therefore take Addonizio's observation into account.

Finally, respondent contends that the data given in note 47 contradict data in the United States Board of Parole, *Biennial Report* (1968-1970) of the Commission. The 1968-1970 *Report* shows, according to Addonizio, that parole was on the average granted after service of 36.3%, or approximately one-third, of the sentence. This figure apparently comes from Table XIII of the *Report*. (Table XII also shows that persons who received parole from white collar crimes were released, on average, after 40.1% of their terms.)

Respondent has misread Table XIII. That table pertains only to time served by prisoners who were in fact paroled, not to time served by all prisoners. Table X of the same report (page 20) discloses that 54.5% of all adult prisoners (and 59% of adult prisoners serving regular sentences) never received parole. That is, from mid-1966 to mid-1970 more than half of all adult prisoners were held until mandatory release on good time credits. Far from supporting respondent, the data in the *Report* strongly support the Commission's position here: at the time of respondents' sentences, the Commission had no settled course of practice of releasing prisoners at the one-third point. Denial of parole was the rule, not the exception.[1]

[1]Table XIII is not as helpful to respondents as it seems, even within its limited coverage. That table includes data from persons serving sentences under what is now 18 U.S.C. 4205(b)(2), who were eligible for release before the one-third point. When the data are broken down so that early releases are excluded, and only persons sentenced, as respondents were, under Section 4205(a) are included, then the pattern described in note 47 of our brief emerges.

Amicus Lewisburg Prison Project makes a different response to the available data. Amicus first contends (Br. 25) that another analysis of the same data shows that "the probability of parole was greatest" during the period between 31% and 50% of the sentence imposed. We do not dispute this finding, although it produces an apples-and-oranges problem when compared with the data in note 47 of our brief. (Most parole *releases* can fall between 31% and 50% of sentences even if most people are not released at all. Like Table XIII of the 1968-1970 *Report*, the data discussed here do not take into account persons who were denied parole.)

It is important to recognize, however, that a discussion of probabilities of release is simply a way of describing (using the standard deviation of release dates) the period within which a given proportion of release takes place. If two-thirds of all parole releases occur within the 31% to 50% range, another one-sixth occurs after 50%. Taking the position of amicus as a given, then, a judge should have expected a substantial number of all prisoners to be held in jail for more than half of their sentences. The fact that respondents were so held[2] thus does not prove that any change of policies has occurred; it shows only that the Commission believed that they were among the inmates deserving to serve the greatest proportion of their sentences.

Amicus also objects (Br. 28-33) to consideration of the Commission's release decisions in cases involving

[2]The data relied on by amicus are less helpful to Whelan and Flaherty than they are to Addonizio. The Commission decided to hold Addonizio until mandatory release. Whelan and Flaherty, however, began serving their 15-year sentences in 1971, and the Commission tentatively decided to release them in 1978, after they had served less than half. The district court reduced Whelan's and Flaherty's sentences before the Commission could decide whether to require them to serve any additional portion of the sentences.

prisoners sentenced under the Federal Youth Corrections Act, 18 U.S.C. 5010, as a basis for specifying some of the criteria spelled out in the Commission's current guidelines. We do not understand the relevance of this point. Amicus apparently believes that the Commission should not have been applying in Youth Corrections Act cases the same criteria it used in regular adult cases, and that a study based on Youth Corrections Act prisoners therefore is improper. But it is unnecessary for the Court to consider what criteria the Commission *should* have been applying in Youth Corrections Act cases long ago. The Commission was in fact applying its usual criteria, and amicus does not contend otherwise.[3] As we shall show, youth cases were not only appropriate, but were the best available class of cases for study.

The study, which was conducted by the National Council on Crime and Delinquency (not by the Commission, as amicus states), focused on Youth Corrections Act sentences because that statute left the Commission almost entirely free to make decisions, unfettered by minimum sentences or varying mandatory release dates. Most Youth Corrections Act sentences were for six years' imprisonment. Such sentences therefore were ideal for research to determine what factors the Commission was taking into account. Regular adult cases might mask the factors: if there was a minimum time of service before parole eligibility, the Commission might be forbidden to release a prisoner who it would otherwise have released under the Commission's approach, and the disparity in maximum terms might have required the

[3]It is now clear that the Commission may apply its usual release procedures and guidelines to persons sentenced under the Youth Corrections Act. See 18 U.S.C. 5005, 5017(a); *De Peralta* v. *Garrison*, 575 F. 2d 749 (9th Cir. 1978). The Commission has elected, however, to employ a special set of guidelines in these cases to take account of the fact that there is a uniform maximum sentence of six years. See 28 C.F.R. 2.20

Commission to release someone who would not have been paroled if the Commission retained discretion in the matter. The indeterminate nature and uniform length of the Youth Corrections Act sentences made it possible to isolate the results of the Commission's approach to decisionmaking from the results produced by statutory minimum and maximum terms.

At all events, as we have pointed out (Br. 59), this case does not turn on the content or source of the guidelines. Respondents were denied release even though that caused them to be confined longer than the guidelines indicate is usual. Nothing in the nature of the sample of cases that was studied to produce the particular content of the guidelines affects this case. Indeed, if, as amicus contends, the content of the guidelines is colored by their derivation from Youth Corrections Act cases, that might simply influence the guidelines in the direction of leniency. The derivation does not show that there has been a radical change in the Commission's practices or that, until 1973, the nature and seriousness of the offense were ignored in making release decisions.

For these reasons, as well as those discussed in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1979

DOJ-1979-03

FOR ARGUMENT

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 78-156

UNITED STATES OF AMERICA, Petitioner,

- vs -

HUGH J. ADDONIZIO, Respondent

UNITED STATES OF AMERICA, Petitioner,

- vs -

THOMAS J. WHELAN and
THOMAS M. FLAHERTY, Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

BRIEF AMICUS CURIAE OF THE LEWISBURG PRISON PROJECT

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INDEX

TABLE OF AUTHORITIES

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 78-156

UNITED STATES OF AMERICA, Petitioner,

- vs -

HUGH J. ADDONIZIO, Respondent

UNITED STATES OF AMERICA, Petitioner,

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ON WRIT OF CERTIORARI TO THE
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BRIEF AMICUS CURIAE OF THE LEWISBURG PRISON PROJECT

Interest of Amicus Curiae

The Lewisburg Prison Project, Inc. is a not for profit corporation which seeks to provide a variety of services to indigent state and federal prisoners in the Lewisburg, Pennsylvania area. One of the Project's most important interests is in parole. The Project regularly provides trained, lay volunteers to serve as parole representatives for indigent federal prisoners, and through its cooperating attorneys has assisted prisoners in individual habeas corpus cases challenging parole denials.

The Project's principal effort in parole litigation is its sponsorship of Geraghty v. United States Parole Commission, No. 76-1467 (M.D. Pa.), on remand from 579 F.2d 238 (3d Cir. 1978), petition for certiorari pending No. 78-572. Geraghty presents the questions of whether the "guidelines for decisionmaking" of the United States Parole Commission are contrary to the Parole Commission and Reorganization Act of 1976, Pub.L. 94-233, 90 Stat. 219-31 (1976) (the "PCRA"), or, if consistent with the Act, are of ex post facto effect as applied to persons sentenced for offenses committed prior to the Act's effective date.

One of the questions at issue in Geraghty is whether the policies first adopted by the United States Board of Parole in 1973, and maintained by the United States Parole Commission subsequent to the enactment of the PCRA, marked a change in parole release decisionmaking which enhanced the effective severity of pre-1973 sentences. The government in the instant case argues to the contrary. (Pet.Br. 27-31, 50-61.) While resolution of this issue may not be necessary for a decision in the present case, we believe that our views, as developed in Geraghty, will be of use to the Court if resolution of that issue is required.

We have communicated with the parties in this cause, and believe that their consents to the filing of this brief will be forthcoming.

Summary of Argument

The petition for writ of certiorari in this case presents the sole question of whether 28 U.S.C. §2255 vests a district court with jurisdiction to correct a sentence to compensate for a revolutionary change in parole policies, unforseen at the time of sentencing, which have the effect of drastically increasing the effective severity of the sentence actually imposed. A different question, however, is addressed by the government in its brief on the merits, which focuses on the change in parole policies, and asserts that there was not a radical revision in those policies justifying collateral relief. Under Rule 23(c) of this Court, these issues should not be addressed in this case, especially when those issues do not appear to have been raised by the government in the Court of Appeals. In our view, the change in focus of the government's case suggests that certiorari may have been improvidently granted.

The narrow question presented in the petition for writ of certiorari was properly answered by the Court of Appeals. Relief is available under 28 U.S.C. §2255 on grounds which could formerly have been advanced on a petition for a writ of coram nobis, and the radical revision in parole policy which occurred after imposition of sentence constitutes a crucial error in fact justifying coram nobis relief.

If the Court chooses to consider the claim that the change in parole policy adopted in 1973 was not a radical revision in policy, this claim must be rejected. The federal parole statute was virtually unchanged from 1910 to 1973, and was firmly rooted in the prison reform movement of the late nineteenth century, and the view that incarceration was primarily for rehabilitation. The static parole criteria gave rise to the assumption on the part of sentencing judges that prisoners, with good institutional behavior, would ordinarily be paroled after having served one third of the sentence imposed. Over the years, the practice developed that a judge who believes that an offender should serve, for example, four years in prison, would customarily impose a sentence in the vicinity of ten years, relying on the availability of parole to mitigate the harsh sentence.

In 1973, however, the Board of Parole adopted explicit parole criteria, which made the parole release decision independent of the actual sentence imposed. These criteria did not codify existing policy, but instead

created new policy, based on the Board's release policy in Youth Correction Act cases. Under this policy, parole was transformed from a device to help individuals reintegrate into society as soon as they are able into a deferred sentencing procedure, and the most significant factor in the parole release decision became a redetermination by the parole borad of the severity of a prisoner's offense.

This case does not present the questions of whether this change in policy was lawful, or whether it was ratified by Congress in the 1976 amendment to the parole statute. At most, the only question in this case which is relevant to the policy adopted in 1973 is whether the new emphasis upon offense severity, and the possibility that parole would be denied merely because the prisoner had committed a serious offense, constituted a crucial error in fact justifying coram nobis relief under 28 U.S.C. §2255. This question was correctly answered by the Court of Appeals, and its decision should be affirmed.

ARGUMENT

I. CERTIORARI MAY HAVE BEEN IMPROVIDENTLY GRANTED

In its brief on the merits, the government vigorously argues that the decisions of the Parole Commission were consistent with the intent of the sentencing court,

(Pet.Br. 46-50), and that the question which should be answered by the Court is whether a sentencing judge may reduce a sentence "because he is surprised to learn that the [Parole] Commission does not yet find the defendant suitable for release on parole." (footnote omitted) (Pet.-Br. 50.) This, however, was not the basis for the decision of the Court of Appeals in this case. Nor was this question fairly presented in the petition for writ of certiorari.

In its decision in this case, the Court of Appeals applied the rule it had adopted in United States v. Salerno, 538 F.2d 1005 (3d Cir. 1976), "that resentencing is required in a [28 U.S.C.] §2255 proceeding where implementation of the Parole Commission's guidelines frustrated the sentencing judge's probable expectations in the imposition of sentence. . ." Addonizio v. United States. 573 F.2d 147, 150 (3d Cir. 1978). (Pet.App. 3a.) The limited scope of this rule had been made clear in the opinion of the Third Circuit upon denial of rehearing in Salerno:

> Our holding is narrow and does not vest sentencing courts, as alleged by petitioner, "with power of a super parole board." Our decision does, however, "permit the district court to correct a sentencing error where the import of the judge's sentence has in fact been changed by guidelines adopted by the Parole Board . . . subsequent to the imposition of that sentence." (citation omitted) 542 F.2d 628, 629.

This rule was faithfully applied by the Third Circuit in this case, which affirmed the district court's decision to correct the sentencing error it had made in respondent Addonizio's case, 573 F.2d at 155 (Pet.App. 18a); the refusal of the district court to resentence respondents Whelan and Flaherty was vacated and the case remanded for reconsideration of their motion under the appropriate and narrow standards. Id. at 156. (Pet.App. 19a-20a.)

The narrow rule articulated by the Third Circuit in Salerno, and applied by that Court in this case, is not addressed by the government. (Pet.Br. 47 n. 38.) Instead, the thrust of the government's argument is that the import of a judge's sentence has not been changed by the parole guidelines (Pet.Br. 50-61), and that the parole policies applied to respondents are consistent with those authorized by Congress. (Pet.Br. 24-44.) While we believe that the government is in error in each of these contentions, see part III infra, in our view those issues are not properly before the Court.

A single question is presented in the Petition for Writ of Certiorari:

> Whether a district court may revise a lawful sentence on collateral attack when decisions of the Parole Commission "frustrated the sentencing intent" of the court. (Pet. for Writ of Cert. 2)..

As posed, this question assumes that "decisions of the Parole Commission 'frustrated the sentencing intent' of the [sentencing] court," precisely the issue which is now seriously contested by the government.

In prior cases, the Court has scrupulously applied its Rule 23(c) to limit review to "questions set forth in the petition or fairly comprised therein."[1] The arguments advanced by the government in its brief on the merits far exceed the narrow jurisdictional question set forth in the petition for writ of certiorari. Nor is the legality of the parole guidelines (Pet.Br. 24-44), a question which is "fairly comprised" within the single question presented in the petition.

Even if the issues raised by the government in its brief are viewed as "fairly comprised" within the single question presented in the petition for writ of certiorari, this case provides a poor vehicle for the Court to evaluate the nature of the revolutionary change in parole policy resulting from adoption of the parole guidelines in 1973. In the Court of Appeals, the focus of the case was

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1. See, e.g., Lawn v. United States, 355 U.S. 339, 362 (1958); Andrews v. Louisville & Nashville R. Co., 406 U.S. 320 ,324-25 (1972); F. D. Rich v. Industrial Lumber Co., 407 U.S. 116, 121 n. 6 (1974); Milliken v. Bradley, 418 U.S. 717, 738 n. 18 (1974); Radzanower v. Touche Ross & Co., 426 U.S. 148, 151 n. 3 (1976); Teamsters v. United States, 431 U.S. 324, 374 n. 61 (1977).

on whether the jurisdictional rule of United States v. Salerno, supra, should be extended to prisoners who received "regular adult sentences" with parole eligibility set by 18 U.S.C. §4203 (1970).[2] See 573 F.2d at 152-53. (Pet.App. 6a-7a.) This, of course, is quite different from the present focus of the case on the legality of the parole guidelines.

One consequence of the change in the government's theories is that there is an inadequate record to assess the arguments raised by the government.[3] Thus, even if the issues raised by the government are construed as "fairly comprised" within the question presented in the petition for writ of certiorari, the change in the government's position makes it appropriate for the Court to consider dismissing the writ as having been improvidently granted. Bankers Trust Company v. Mallis, 435 U.S. 381 (1978). Such a disposition would be especially appropriate when the questions addressed by the government will ultimately be decided on a full record by the district court on remand in Geraghty, supra.

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2. The prisoner in Salerno had been sentenced under 18 U.S.C. §4208(a)(2) (1970). 538 F.2d at 1006.

3. The government seeks to overcome the inadequate record by referring the Court to secondary sources. (Pet.Br. 54 & n. 46). These materials have not been tested by an adversary fact finding process and, as shown by the record in Geraghty, supra, are seriously in error. See infra, at 28-34.

II. THE COURT OF APPEALS CORRECTLY ANSWERED THE NARROW QUESTION PRESENTED IN THE PETITION FOR WRIT OF CERTIORARI

The narrow question presented in the petition for writ of certiorari relates to the scope of jurisdiction vested in the sentencing court by 28 U.S.C. §2255. (Pet. for Writ of Cert. 2.) The government would have the Court answer this question by viewing the decision of the Court of Appeals as a response to the failure of the parole board to have granted parole in a particular case. (Pet.Br. 44-52.) This is an incorrect view of the decision below, which properly construed and applied the jurisdictional limits of 28 U.S.C. §2255.

Section 2255 was intended to alleviate the burden of habeas corpus petitions filed by federal prisoners in the district of confinement. See United States v. Hayman, 342 U.S. 205 (1952). The statute vests the sentencing court with the power "to vacate, set aside, or correct" a sentence on the grounds which could previously have been raised in a habeas corpus proceeding.[4] In addition, Section 2255 vests the sentencing court with the power "to vacate set aside, or correct" a sentence which "is otherwise subject to collateral attack."[5]

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4. Section 2255 was intended to be fully coextensive with the remedy formerly provided by habeas corpus. Hayman, supra, 342 U.S. at 219.

5. Section 2255 is reproduced in petitioner's brief at 3.

At the time of the adoption of Section 2255, a conviction was "subject to collateral attack" through a petition for a writ of coram nobis. United States v. Mayer, 235 U.S. 55 (1914). This writ was

> available to bring before the court that pronounced the judgment errors in matters of fact which had not been put in issue or passed upon, and were material to the validity and regularity of the legal proceeding itself; as where the defendant, being under age, appeared by an attorney, or the plaintiff or defendant was a married woman at the time of commencing the suit, or dies before verdict or interlocutory judgment -- for, it was said, "error in fact is not the error of the judges, and reversing it is not reversing their own judgment . . . " Id. at 68.

The decision of the Court of Appeals upholding the existence of jurisdiction under 28 U.S.C. §2255 conformed to these standards for coram nobis relief. The crucial error of fact was the district court's belief at the time of sentencing that respondent Addonizio would not be denied parole merely because he had committed a serious offense. (Pet.App. 28a-29a.)[6] Had the district judge been aware of this fact, he would have imposed a three

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6. The question of whether a crucial error of fact had been made in sentencing respondents Whelan and Flaherty is part of the remand order of the Court of Appeals. 573 F.2d at 156 (Pet.App. 19a).

and one-half to four year sentence, rather than the ten year sentence actually imposed. (Pet.App. 28a).[7]

The decision of the district court to correct Addonizio's sentence is thus consistent with the essence of coram nobis relief, and was within the powers vested in the court by 28 U.S.C. §2255 to correct a sentence "which is otherwise subject to collateral attack." This is in accord with United States v. Tucker, 404 U.S. 443 (1972), where the Court held that Section 2255 provided the appropriate remedy for reconsideration of a sentence "founded at least in part upon misinformation of constitutional magnitude." Id. at 447.

The government would apparently exclude coram nobis relief from Section 2255 by limiting the "otherwise subject to collateral attack" clause of the statute to situations involving "a complete miscarriage of justice." (Pet.Br. 46.) Although we believe that the revolutionary

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7. This is the sentencing procedure enunciated by Judge Will in United States v. Randle, 405 F.Supp. 5 (N.D.Ill. 1975):

> [In light of the present parole policies], the only way a judge can effectively exercise his sentencing responsibility and judgment is to impose a sentence which, less statutory good time, will result in the period of incarceration he deems appropriate and forget about the Parole Board and the possibility of parole. Id. at 7.

change in parole procedure has worked such a miscarriage of justice, see section III below, this limitation upon Section 2255 relief is only applicable to cases where relief is sought "upon the ground that the sentence was imposed in violation of the . . . laws of the United States." See Davis v. United States, 417 U.S. 333, 346 (1974).

Nor does the crucial error in fact involve a mere disagreement between the sentencing judge and the parole board about when parole should be granted. (Pet. Br. 48-50.) As the opinion of the district court makes clear (Pet.App. 29a), the crucial error of fact was the belief that parole would not be denied merely because Addonizio had committed a serious offense.

The government's reliance upon United States v. Murray, 275 U.S. 347 (1928) and Affronti v. United States 350 U.S. 79 (1955) (Pet.Br. 44-45) is misplaced. In neither case did the Court consider whether 28 U.S.C. §2255 allowed coram nobis relief. In Murray, the Court construed the then newly enacted probation statute, 43 Stat. 1259 (1925), and held that the act did not allow a district judge to transform a sentence of imprisonment into a term of probation once execution of the sentence had commenced. 275 U.S. at 359. The probation statute was altered in connection with the revision and codification of Title 18 in 1948, 62 Stat. 842 (1948), and was construed in Affronti as not allowing a district court to exercise its "probation power . . . after the beginning of

any term of a sentence." 350 U.S. at 82. These statutory interpretations of the probation statutes have no bearing upon the scope of coram nobis relief under 28 U.S.C. §2255.

The difference between modifying a sentence because of a disagreement with a parole decision and correcting a sentence because of a crucial error of fact explains the conflicting decision of the First Circuit in United States v. McBride, 560 F.2d 7 (lst Cir. 1977). The question decided in that case was whether Section 2255 relief would be appropriate because of "the sentencing court's failure to predict what the parole authorities would do." Id. at 11. The same approach was the basis for decision in Andrino v. United States, 550 F.2d 519 (9th Cir. 1977) and Wright v. United States, 557 F.2d 741 (6th Cir . 1977).[8]

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8. The conflicting decisions in the Second and Fourth Circuits are based on a misunderstanding of the radical change in parole policy which took place in 1973. See Dioguardi v. United States, 587 F.2d 572, 575 (2d Cir. 1978)(new parole policy "merely clarified the exercise of [the Board's]] administrative discreation).; Farmer v. United States Parole Commission, 588 F.2d 54, 56 (4th Cir. 1978)(new parole policy is consistent "with both the letter and spirit of the law"). While we believe that the question of whether there was a radical change in parole policy in 1973 is not before the Court in this case, we show in Part III below that there was in fact a radical revision of policy.

In our view, coram nobis relief under 28 U.S.C. §2255 is appropriate whenever sentence was imposed without a full understanding of the revolutionary change in parole policies adopted in 1973.[9] Any other rule would enhance the "national disgrace"[10] of unwarranted sentence disparity. Prisoners sentenced by a judge who understands present parole policy would serve the amount of time in prison intended by the judge, while prisoners sentenced without a full understanding of parole policy will serve far more time in prison than that intended by the sentencing judge.

The burden that this rule would place on district judges will be minimal -- first, because the number of prisoners sentenced without a full understanding of the guidelines is steadily decreasing, and second, because the

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9. We therefore disagree with the view of the Eighth Circuit, United States v. Lacy, 586 F.2d 1258 (8th Cir. 1978)(in banc), that relief depends upon whether the prisoner received "meaningful parole consideration" id. at 1262, and is limited to prisoners who were sentenced under 18 U.S.C. §4208(a)(2) (1970) prior to November 19, 1973, when the new policy was adopted. Id. As recent congressional testimony shows, see infra, at 24 - 25, district judges continue to misunderstand the Board's parole release policies.

10. 124 Cong.Rec. S. 13 (daily ed., Jan. 17, 1978) (remarks of Senator Kennedy).

sentencing judge need not hold a plenary hearing to determine if the prisoner received "meaningful parole consideration." The district judge need only reduce sentenced imposed without a full understanding of the post-1973 parole policies in order to reflect the amount of incarceration intended. This is precisely the rule adopted by the Third Circuit in United States v. Salerno, supra, and it is the rule correctly applied by the Court of Appeals in this case.[11]

III. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE 1973 RADICAL REVISION IN PAROLE POLICY WAS A CRUCIAL ERROR IN IMPOSITION OF SENTENCE

The core of the government's argument in this Court is that the failure of the District Court to have anticipated the radical change in parole policy adopted in

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11. We do not suggest that any minor change in the parole guidelines would justify resentencing. First, it is the revolutionary change in policy, implemented by the guidelines, which is the crucial error justifying resentencing. Second, assuming that the guidelines are lawful — the question at issue in Geraghty, supra -- a change in the "customary length of imprisonment" of the guidelines would not be a crucial error justifying resentencing. Instead, it could be redressed by a habeas corpus petition, under 28 U.S.C. §2241, challenging the execution of the sentence on the ground that the increase in the "customary length of imprisonment" constituted an ex post facto law.

1973 -- after respondents were sentenced -- was not a crucial error in the imposition of sentence. (Pet.Br. 50-61.) While we believe that this question is not properly before the Court, and should not be decided on the record of this case, our primary purpose in filing this brief amicus curiae is to present the Court with our views, developed in Geraghty, supra, about the revolutionary parole policy adopted in 1973. We therefore discuss below federal parole law and its impact on sentencing practices prior to 1973, and the radical revision in parole release policy in 1973.[12]

A. Federal Parole Law and Its Impact Upon Sentencing Practices Prior to 1973

Parole is the product of prison reformers of the late nineteenth century who believed that "reformation is the primary object to be aimed at in the administration of penal justice."[13] The first modern parole statute, enact-

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12. The questions of whether this change in policy was lawful, or was ratified by Congress in the PCRA, are not at issue in this case. Those are the questions at issue in Geraghty, supra.

13. Wines, Prison Reform 13 (1910), quoted in LaRoe, Parole With Honor 55 (1939). See Lindsey, Historical Sketch of the Indeterminate Sentence and Parole System, 16 J.Crim.L. & Crim. 9, 10-18 (1939); Goldfarb & Singer, After Conviction, 261 - 62 (1973); Carter, McGee & Nelson, Correction in America, 200 - 03 (1976).

ed for use at the Elmira reformatory in New York in 1877,[14] viewed parole "as the culmination of a course of varied institutional training programs, whereby the inmate's capacity and willingness to reform could be tested by serving a part of the sentence in the community on parole."[15] In pertinent part, N.Y. Laws 1877, ch. 424 provided that a prisoner could be released on parole:

> [W]hen it appears to said managers [of the reformatory] that there is a strong and reasonable probability that any prisoner will live and remain at liberty without violating the law and that his release is not incompatible with the welfare of society . . . (emphasis supplied)

Parole was incorporated into federal law in 1910. 36 Stat. 819 (1910). As the legislative history of the Act reveals, parole had at that time "come to be regarded as humane, in the interests of sound policy, and highly

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14. "The year 1876 marked the beginning of parole in America, inasmuch as, for the first time in this country, parole was used at Elmira in a manner comparable to present day parole administration." 4 Attorney General's Survey of Release Procedure 19 (1939).

15. Reed, Parole vs. The Determinate Sentence in the Administration of Criminal Justice, 1975 Proceedings of the Congress of Correction of the American Correctional Association 259, 263.

beneficial to the welfare of society." H.Rep. 1341, 61st Cong. 2d Sess., 4 (1910). To provide "an opportunity to relieve the prisoner whose reform had been effected and who gives promise of future good conduct,"[16] Congress made parole available to every federal prisoner serving a sentence of over one year who had exhibited good institutional adjustment, and who had served one-third of the total sentence imposed.[17] The criteria for release on parole tracked the language of the seminal New York statute of 1877; in pertinent part, the Act of June 25, 1910 provided:

> . . . [I]f it shall appear to said board of parole from a report by the proper officers of such prison or upon application by a prisoner that there is a reasonable probability that such applicant will live and remain at liberty without violating the laws, and if in the opinion of the board such release is not incompatable with the welfare of society, then said board may in its discretion authorize the release of such applicant on parole . . . 36 Stat. 819-20. (emphasis supplied)

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16. Hearings on S. 870 and H.R. 23016, before Subcommittee of the House Committee on the Judiciary, 61st Cong., 2d Sess., 27 (1910). (Testimony of Judge W.H. DeLacy).

17. The Committee Hearings, supra, note 16, reveal that the choice of the one-third point for parole eligibility was essentally arbitrary (id. at 9), and that it was thought that a prisoner could not demonstrate rehabilitation "until he had been in for a certain time." Id. at 8.

Three years later, parole was made available to prisoners who had received life sentences, but who had served at least fifteen years in prison. 37 Stat. 650 (1913). The 1930 amendment to the parole statute, 46 Stat. 272 (1930), replaced the original parole board -- which had consisted of the superintendent of prisons and the warden and physician of each prison — with what was intended to be "an independent parole board," to be appointed by the Attorney General. H.Rep. 104, 71st Cong., 2d Sess., 1 (1930).[18] Problems developed, however, with the independence of the parole board,[19] and in 1950 Congress required that members of the board be appointed by the President, and approved by the Senate. 64 Stat. 1085 (1950).

In 1951, parole was extended to prisoners serving sentences in excess of one hundred and eighty days. 65 Stat. 277 (1951). This was viewed as the minimum period needed "before the authorities can determine the degree of rehabilitation that would warrant the parole of a prisoner." S.Rep. 524, 82nd Cong., 1st Sess. 2 (1951).

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18. The 1930 amendments also gave to the Board the power to parole without the approval of the Attorney General. 46 Stat. 272.

19. The Parole Board and the Attorney General were shown to have submitted to pressure to release former members of the "Capone gang" after they had served their minimum sentences. See Goldfarb & Singer, After Conviction 170 (1973).

Prior to 1958, a prisoner was required to serve one third of his or her sentence before becoming eligible for parole. 18 U.S.C. §4202 (1950). In 1958, Congress brought indeterminate sentencing to federal law, and vested district judges with the power to authorize parole eligibility at any time, from the first day of imprisonment (18 U.S.C. §4208(a)(2) (1958), or at any time up to one third of the total. 18 U.S.C. §4208(a)(1) (1958). This statute "was intended to give district judges a mechanism to adjust the length of a defendant's sentence to his progress in rehabilitation programs and his attitude toward a return to society." United States v. Salerno, supra, 538 F.2d at 1008.[20]

There were no other changes in federal parole law when the Board of Parole adopted its explicit parole release criteria, discussed below, in 1973. The majority of prisoners received "regular adult sentences," and

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20. The government offers a different view of the intent of the statute. (Pet.Br. 57-58). This question may have been presented in Bonnano v. United States, No. 77--1665, but certiorari was dismissed in that case under Rule 60 on February 1, 1979. Thus, there is no occasion for the Court to consider the dispute as to the Congressional intent underlying 18 U.S.C. §4208(a)(2) (1970).

became eligible for parole after having served one third of their total sentence,[21] and the criteria for granting parole were virtually unchanged from the seminal New York statute of 1877. Thus, in 1973, 18 U.S.C. §4203(a) provided as follows:

> If it appears to the Board of Parole from a report by the proper institutional officers or upon application by a prisoner eligible for release on parole, that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole. (emphasis supplied).

Parole was thought to be dependent upon "the conduct of penitentiary convicts during their incarceration." United States v. Murray, 275 U.S. 347, 357 (1928). As aptly summarized by the Court in Morrissey v. Brewer, 408 U.S. 471 (1972):

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21. Of the 11,071 persons sentenced to imprisonment in 1970, 6,688, or 60%, received "regular adult sentences," i.e., sentences where parole eligibility came at the one-third point of sentence under 18 U.S.C. §4203 (1970). Administrative Office of the United States Courts, Federal Offenders in the United States District Courts 1970, 2 (1972). The percentage rises to 69% when Youth Correction Act and Federal Juvenile Delinquency Act prisoners (totaling 1447) are excluded. Id.

> During the past 60 years, the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system. Note, Parole Revocation in the Federal System, 56 Geo.L.J. 705 (1968). Rather than being an ad hoc exercise of clemency, parole is an established variation on imprisonment of convicted criminals. Its purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed. It also serves to alleviate the costs to society of keeping an individual in prison. The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence. Under some systems, parole is granted automatically after the service of a certain portion of a prison term. Under others, parole is granted by the discretionary action of a board, which evaluates an array of information about a prisoner and makes a prediction whether he is ready to reintegrate into society. (footnote omitted) Id. at 477-78.

This view of parole and the general use of "regular adult sentences" where a prisoner would become eligible for parole after serving one-third of the total sentence, gave rise to the "historical assumption that the Board will give meaningful consideration to a defendant with a good institutional record at the expiration of one-third of his sentence."[22] District judges would ordinarily impose

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22. Garcia v. United States Board of Parole, 409 F.Supp. 1230, 1239 (N.D. Ill. 1976), rev'd on other grounds, 557 F.2d 100 (7th Cir. 1977).

sentence by relying "on the assumption that parole will be accorded at the one-third point."[23] As District Judge Lasker recently testified before the Senate Judiciary Committee:

> Many judges, I have to say, Mr. Chairman, habitually impose long or fairly long sentences in the expectation that a grant of parole will result in the actual time served being much less than originally imposed. (Hearings on S. 1437 before the Subcomm. on Criminal Laws and Procedures of the Sen. Comm. on the Judiciary, 95th Cong., lst Sess., pt. 12, at 8969.)

The identical view was expressed by former district judge and then chairman of the Advisory Corrections Council of the Judicial Conference, Harold Tyler:

> You know, and I know, as lawyers, that for years we have read in the papers that an offender, John Doe, has been sentenced to 15 years but we know he is not going to serve 15 years. He is going to serve perhaps 5 years.
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> The public doesn't understand this. We lawyers perhaps do, but I'm not even sure we do all the time. (Hearings on S. 1437, supra, at 8960).

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23. Newman, Preface to Project, Parole Release Decisionmaking and the Sentencing Process, 84 Yale L.J. 810, 812 (1975).

This understanding of the availability of parole to mitigate a harsh sentence is reflected in a survey of district judges[24] and was recently acknowledged by the Senate Judiciary Committee in its report accompanying S. 1437, the proposed revision of the federal criminal code:

> A federal judge who today believes that an offender should serve four years in prison may impose a sentence in the vicinity of ten years, knowing that the offender is eligible for parole release after one third of the sentence. (S.Rep. 95-605, 95th Cong., lst Sess., at 1169).

In this Court, the government presents statistics (Pet.Br. 55 n. 47) which purport to show that district judges were mistaken in their understanding of parole. These statistics, however, may be somewhat misleading. Another analysis of the same data, performed by an independent researcher, shows that the probability of parole was greatest when the prisoner had served between 31 to 50 percent of the total sentence imposed. Schmidt, Demystifying Parole 83 (1976). This statistic, in our view, is the one which is relevant to the "historical assumption" that parole would ordinarily be granted after the prisoner served one-third of his or her sentence.

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24. See Project, supra note 23 at 882 n. 361 (88% of judges responding to survey stated that they considered likelihood of parole in determining length of sentence to impose.)

In 1973, however, the parole board adopted rules which made the parole release decision independent of the length of the sentence imposed, see Geraghty, supra, 579 F.2d at 255, and it is now only a coincidence if a prisoner is paroled after serving a third of the sentence imposed. The rules adopted by the parole board for parole release coincide with the length of time in custody before parole eligibility for only half of all persons sentenced to terms of imprisonment,[25] and approximately one quarter of all prisoners are routinely denied parole because they received sentences which are too short to allow them to be paroled under the board's rules.[26] The revolutionary philosophy which is implemented by these rules -- the "parole guidelines" -- is discussed below.

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25. Senate Hearings on S. 1437, supra, at 9000.

26. This statistic was supplied by the Parole Commission in Geraghty, supra.

B. The Revolutionary Change in Parole Practices in 1973

In 1973, the Board of Parole[27] adopted explicit parole release criteria[28] which, as one of the architects of the new policies has admitted, implement a "revolutionary philosophy" in which parole boards "act as sentencing review bodies" to determine "the time convicted offenders should serve in prison."[29] In this Court, the government argues that this "revolutionary philosophy" did not amount to a radical change in policy. (Pet.Br. 50-61.) We disagree.

The keystone of the government's arguments is its assertion that the explicit parole criteria adopted in 1973 are based on an analysis of the board's prior decisions. (Pet.Br. 27-29, 54.) While this assertion has been

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27. The Board of Parole was renamed the Parole Commission in the PCRA in 1976. Throughout this brief, the two names are used interchangeably.

28. Explicit parole release criteria were held to be constitutionally required in Childs v. United States Board of Parole, 371 F.Supp. 1246 (D.D.C. 1973). The parole board acquiesced in that portion of the district court's decree. See 511 F.2d 1270, 1273-74 (D.C. Cir. 1974) (affirming other portions of the decree which had been challenged by the board).

29. Wilkins, Additional Views of Individual Committee Members of the Committee for the Study of Incarceration in Von Hirsch, Doing Justice 178-79 (1976).

repeated so many times that it has achieved an air of truth, it is seriously in error.

The record developed in Geraghty, supra, reveals that the analysis of parole decisionmaking referred to in the numerous secondary sources cited by the government (Pet.Br. 29 nn 16, 17, 54 n. 46) consisted only of a study of decisions made by the Youth Correction Division of the United States Board of Parole in 340 cases from November 1, 1971 to May 30, 1972. Hoffman, Paroling Policy Feedback 7-8 (NCCD Parole Decisionmaking Project Supp. Rep. No. 8, 1973.) This study tested the hypothesis that decisions in Youth Corrections Act cases were based on four factors,[30] id. at 12, and concluded that the most important of those factors was a judgment of the severity of the prisoner's offense. Id. at 16. Only one other factor was found to be contributing to decisionmaking -- a judgment of the likelihood that the offender could successfully complete a parole term. Id. at 12. These two factors were then chosen by the board as the basis for prospective decisionmaking, not only in Youth Corrections Act cases, but in cases dealing with adult prisoners. Hoffman & Gottfredson, Paroling Policy Guidelines: A Matter of Equity 5-9 (NCCD Parole Decisionmaking Project Supp. Rep. No. 9, 1973).

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30. The four factors were offense severity, parole prognosis, institutional program participation, and institutional discipline. Hoffman, supra at 12.

The Youth Act policy provided a poor model for parole decisions in cases dealing with adult offenders.[31] A Youth Corrections Act offender is eligible for release immediately upon imprisonment, 18 U.S.C. §5017(a), and will generally be confined for an indeterminate period of up to six years. 18 U.S.C. §5017(c). Adult offenders, in

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31. In addition, the Youth Act policy was unlawful. The board's primary reliance upon offense severity was contrary to the central purpose of the Youth Corrections Act that "execution of the sentence was to fit the person, not the crime for which he was convicted." Dorszynski v. United States, 418 U.S. 424, 433 (1974). It is for this reason that a number of courts have held the board's post-1973 explicit parole criteria to be unlawful as applied to Youth Corrections Act prisoners. See, e.g., United States ex rel Mayet v. Sigler, 403 F.Supp. 1243 (M.D. Pa. 1975), aff'd without published opinion, 556 F.2d 570 (3d Cir. 1977); Fletcher v. Levi, 425 F.Supp. 918 (D.D.C. 1976); DePeralta v. Garrison, 575 F.2d 749 (9th Cir. 1978).
The release criteria of the Youth Corrections Act, 18 U.S.C. §5017(a), were amended as part of the PCRA in 1976. The purpose of the amendment was "to provide for parallel release criteria for all eligible prisoners." H.Conf.Rep. 94-238, 94th Cong., 2d Sess., 36 (1976). This amendment has been read as repealing the rehabilitative purpose of Youth Act commitments. See, e.g., DePeralta v. Garrison, supra. If this was the intent of Congress, however, it was not clearly expressed in the legislative history of the PCRA. Cf. Muniz v. Hoffman, 422 U.S. 454, 470 (1975) ("To read a substantial change in accepted practice into a revision of the Criminal Code without any support in the legislative history of that revision is insupportable.")

contrast, must generally serve one-third of their sentence before becoming eligible for release on parole,[32] and may receive any sentence up to the maximum allowed by statute.[33]

Had the parole board studied its implicit policies in cases involving adult prisoners, it is obvious that length of sentence and percentage of total sentence served would have been found to be factors in the parole release decision. It is, of course, impossible for the board to have been granting parole to prisoners before they became eligible for parole; nor could the board have been granting parole after the prisoner had fully served the sentence imposed by the district judge. These, however, are the results of applying the Youth Act policy to adult prisoners -- only fifty percent of the defendants sentenced to imprisonment are even eligible for parole after they have served the amount of time in custody "predicted" by the Youth Act policy[34] -- one quarter have satisifed their sentences, and another twenty five percent are not yet eligible for parole.

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32. See note 21 supra.

33. See, e.g., Gore v. United States, 357 U.S. 386 (1958); Townsend v. Burke, 334 U.S. 736 (1948); Blockburger v. United States, 284 U.S. 299 (1932).

34. Senate Hearings on S. 1437, supra, at 9000. (prepared statement of Ronald L. Gainer, Acting Deputy Assistant Attorney General, Office for Improvements in the Administration of Justice)

It is therefore not surprising that when an independent researcher studied the board's decisionmaking policies for cases dealing with adult prisoners, using pre-1973 data, she found that the factors most predictive of actual parole decisionmaking were time served, length of sentence, and custody classification at the time of the parole hearing. Schmidt, Demystifying Parole 62 (1976).

The questions of whether it was perpetuating an unlawful Youth Corrections Act policy, or mistakenly applying that policy to adult offenders, does not appear to have been considered by the board, whose researchers erroneously viewed parole as a "deferred sentencing decision,"[35] rather than as an "established variation on imprisonment . . . to help individuals reintegrate into society as constructive individuals as soon as they are able." Morrissey v. Brewer, 408 U.S. 471, 477 (1972).[36]

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35. Hoffman & Gottfredson, Paroling Policy Guidelines: A Matter of Equity 3 (NCCD Parole Decisionmaking Project Supp.Rep. No. 9, 1973).

36. The failure of the federal Board of Parole to have considered the change in policy which resulted from applying the Youth Act policy to adult prisoners stands in vivid contrast to the reaction of the North Carolina Parole Commission when researchers sought to adopt the federal policy model to North Carolina: "In discussing the federal guideline study, the [North Carolina Parole] Commissioners commented that, unlike the United States Parole

(Continued, p. 32)

This revolutionary philosophy of parole as a deferred sentencing decision was implemented in part through the board's "guidelines for decisionmaking," 28 C.F.R. §2.20. The facts surrounding the genesis and application of the guidelines have yet to be reliably determined, see Geraghty, supra, and we agree with the government (Pet.Br. 59) that the guidelines per se are not at issue in this case. All that may be involved in this case is the radical change in policy adopted by the board in 1973 when it sought to apply its Youth Act policies to adult prisoners.

Perhaps the most salient aspect of the board's post-1973 policies is the complete rejection of factors relevant to the "conduct of penitentiary convicts during their incarceration." United States v. Murray, supra, 275 U.S. at 357.[37] The focus of post-1973 parole decision-

Commission, they were not strongly influenced by the seriousness of the offense. They believed that the judge considered this factor in sentencing, and that it was not their responsibility, in effect, to resentence the inmate. In addition, they explained that because inmates must serve one-quarter of their sentence, this mandatory term represented the deterrent and retributive aspects of the sentence." Gottfredson, Cosgrove, Wilkins, Wallerstein & Raugh, Classification for Parole Decision Policy 38 (1978).

37. It has been suggested that this emphasis is contrary to the "release will not jeopardize the public welfare" standard of 18 U.S.C. §4206(a) (1976). O'Donnell, Churgin, & Curtin, Toward a Just and Effective Sentencing System, 29 n. 30 (1977).

making is on assessing the severity of a prisoner's offense, and determining if, irrespective of the actual sentence imposed, the prisoner has served enough time in prison.

The government offers several arguments to support its claim that adoption of the Youth Act policies for adult prisoners in 1973 "did not add new criteria to the parole decision making process." (Pet.Br. 58.) These arguments are equally without merit.

First, the government asserts that in enacting the 1976 Parole Commission and Reorganization Act, Congress indicated its view that the parole board had not changed its policy in 1973 when it adopted explicit parole criteria. (Pet.Br. 58-59.) For the reasons set out in Geraghty, supra, 579 F.2d at 255-59, we disagree with this view of the legislative history of the PCRA.[38] But even if the legislative history of the 1976 Act is read in the manner claimed by the government, this would be of no real consequence in this case. See Teamsters v. United States, 431 U.S. 324, 354 n. 39 (1977).

Second, the government relies on a number of secondary sources (Pet.Br. 27-29, 54), all of which repeat the error that the policy adopted in 1973 was based on a study of actual decisionmaking, but none of which

38. This case, of course, does not present the question of whether the board's 1973 parole policies were ratified by Congress in the 1976 PCRA.

recognize that the study was limited to decisionmaking in Youth Corrections Act cases. Thus, the "knowledge" referred to in Hoffman, Sigler & Wilkins, Making Paroling Policy Explicit, 21 Crime & Delinquency 34,. 37 (1975) that "a parole board's decisions could be predicted accurately by knowledge of its rating of three factors" refers only to the findings of the Youth Corrections Act study. The same misapprehension of what was actually studied is apparent in Project, Parole Release Decisionmaking and the Sentencing Process, 84 Yale L.J. 810, 823 n. 61 (1974), Singer, In Favor of "Presumptive Sentences" Set By a Sentencing Commission, 24 Crime & Delinquency 401, 417 (1978), and in the other secondary sources cited by the government.

Finally, the government relies on statements made by the parole board prior to 1973 that it would consider offense severity in parole decisions. (Pet. Br. 52-53.) The mere consideration of offense severity is quite different from the primary reliance upon severity in the post-1973 policy, and as shown above, it cannot seriously be argued that there was not a change in policy in 1973.

There is absolutely no factual basis for the government's claim that the new parole policy adopted in 1973 is "essentially a codification of the factors that the Commission was apparently considering all along." (Pet.Br. 60.) On the contrary, the policies adopted in 1973 require that "individuals will serve more time [in prison

before being paroled] than they have in the past." Schmidt, Demystifying Parole, supra, 50.

CONCLUSION

We join with respondents in their prayer that the judgment below be affirmed.

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